TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1944

No. 340

LEE F. WEILER, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 12, 1944.

CERTIORARI GRANTED OCTOBER 9, 1944.

IN THE

United States Circuit Court of Appeals

FOR THE THIRD CIRCUIT.

No. 8496. OCTOBER TERM, 1943.

UNITED STATES OF AMERICA,
Appellee,
vs.
LEE F. WEILER,
Appellant.

APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Appendix for Appellant.

PETER P. ZION,
1600 Walnut St.,
Philadelphia, Pa.,
Attorney for Appellant.

RECEIVED & FILED

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JAN 31 1944

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APPENDIX.

DOCKET ENTRIES.

May	12,	1943	True Bill.
"	13	"	Motion for and Order of Court directing that bench warrant issue, filed. Bench Warrant exit.
"	14	"	Bond of defendant in $1500. with surety, filed.
"	15	"	Bench Warrant returned: "C. C." and filed.
"	19	"	Appearance of Peter P. Zion, Esq., for defendant, filed.
"	28	"	Motion to quash indictment, filed.
"	28	"	Notice of motion to quash indictment, filed.
June	14,	1943	Argued sur motion to quash indictment. C. A. V.
"	15,	"	Opinion, Ganey, J., denying motion to quash filed.
Aug.	25,	1943	Plea: Not Guilty.
Sept.	28,	1943	Jury called and sworn.
"	28,	"	Trial—witnesses sworn.
"	29,	"	Trial resumed.
"	29,	"	Verdict: Guilty (Bail continued pending motion for new trial).
"	29,	"	Defendant's points for charge filed.
"	29,	"	Order of Court directing Marshal to furnish meals to jurors filed.
Oct.	2,	1943	Motion for new trial, filed.
"	2,	"	Motion in arrest of judgment, filed.
"	6,	"	Additional reasons in support of motion for new trial, filed.

"	6,	"	Argued sur motions for new trial and in arrest of judgment, C. A. V.
"	8,	"	In open Court: The Court (Kennedy, J.) orally overrules the motion for new trial and motion in arrest of judgment.
"	8,	"	Sentence: Imprisonment for term of one year and one day.
"	8,	"	Defendant moves for allowance of bail pending appeal. The Court refers application for bail to the Appellate Court.
"	8,	"	Judgment and Commitment, filed. 2 Cert. copies exit.
"	8,	"	Defendant's Notice of Appeal, filed.
"	8,	"	Acceptance of service of copy of notice of appeal, filed.
"	8,	"	Copy of Clerk's statement of docket entries, filed.
"	8,	"	Certified copy of order of U. S. Circuit Court of Appeals admitting defendant to bail, filed.
"	8,	"	Bond of defendant in $2500., with surety, filed.
"	9,	"	Bill of Exceptions and Order of Court sealing same, filed.
Nov.	3,	"	Designation of contents of Record on appeal filed.
"	3,	"	Assignments of Error filed.

INDICTMENT.

1. The Grand Inquest of the United States of America, inquiring in and for the Eastern District of Pennsylvania, upon their respective oaths and affirmations do present that heretofore, to wit: on or about March 24, 1943, Lee F. Weiler, defendant herein, resided at Philadelphia, in the Eastern District of Pennsylvania, and within the jurisdiction of this Court.

2. On or about March 24, 1943, Lee F. Weiler, being duly sworn according to law by Nellie G. Schuyler, a deputy clerk of the United States District Court, before a competent person, to wit: Harry E. Kalodner, Judge of the District Court of the United States in and for the Eastern District of Pennsylvania, in the matter of *United States vs. Lee F. Weiler and Ellwood T. Evans*, December Sessions, 1942, No. 10694, at Philadelphia, in the Eastern District of Pennsylvania, being a matter in which the law of the United States authorizes an oath to be administered, did swear that the testimony he was about to give before the aforesaid Harry E. Kalodner, Presiding Judge, would be the truth, the whole truth, and nothing but the truth, did knowingly, wilfully, fraudulently, unlawfully and feloniously then and there testify to certain material matters and facts which he, the said defendant Lee F. Weiler, did not believe to be true, and, on the contrary, knew them to be untrue and false, said false testimony being more particularly as follows:

The Court: When was the filing of this inventory required, Mr. Curtin, or called for?

Mr. Zion: December 31st.

The Court: When was the call made for it?

Mr. Curtin: December 31st. Mr. Steinbrook testified that there never was any extension of that date, and that it was to be filed by December 31st.

By The Court:

Q. And why did you say you didn't file such a report?

A. We got PD-216 on January 5, 1942, and it said on the face of it it must be filed before December 31st, 1941.

Q. All right.

A. What's the use of filing it?

Q. I thought you said a minute ago that you didn't file it because you were winding up your business?

A. That is quite it,—every three months you had to file.

Q. You say that you were to file one every three months?

A. Yes, sir.

Q. Did you file one for the first three months of 1942?

A. No, sir. That was in March, and I had no tires then.

By Mr. Zion:

Q. What is that?

A. I had no tires in March.

By Mr. Curtis:

Q. As a matter of fact, didn't you buy tires in March 1942?

A. I did not.

* * * (This Indictment, p. 3)

By The Court:

Q. Did you purchase these tires?

A. I did not.

Q. You didn't purchase them?

A. Absolutely not.

Q. Who ordered them?

A. I did.

Q. Then you never got them?

A. No, sir.

Q. In other words, Government's Exhibit 6 is a letter addressed to the United States Petroleum Corporation, dated March 24, 1942, in which you state:

> "Inasmuch as you are a distributor we have purchased from you 150 600 x 15 Standard and Convoy tires and 20 625—50 x 16 Standard tires under date of March 16th."

That is a total of 170 tires?

A. That is right.

Q. And did you make that statement?

A. I did write that.

Q. You state in that letter that you purchased them?

A. That is right.

Q. And now why did you say that you didn't?

A. Do you want an explanation of the whole Transaction?

Q. Just answer the questions now.

By Mr. Curtin:

Q. First you said that you didn't purchase them, and that you say in that letter—

A. That is right—I never received them, and didn't purchase them.

Q. Why did you sign that letter, then?

A. I want to explain—

Q. All right.

A. The manager for the concern, the United Petroleum Corporation, disposed of some tires, and he asked me whether I would write these people a letter explaining I was in a position and was allowed to buy these tires—which I did. They printed this, and I signed it.

Q. And swore to it?

A. That wasn't on there when I wrote the name there. (Indicating).

Q. Are you sure about it?

A. I wrote this at my place of business.

Q. You are pretty sure about it?

A. It is so far back—

Q. This is only March, 1942.

A. That is right.

Q. You remember the transaction, somebody came to you and said, "Will you sign the letter"?

A. That is right.

Q. That is a pretty good transaction?

A. Yes, sir.

Q. It was an accommodation on your part, was that it?

A. That is right.

Q. You remember that?

A. Yes, sir.

Q. Don't you remember whether or not you signed that and swore to it in the presence of a Notary Public?

A. I couldn't answer.

Q. You don't remember that?

A. No, I do not.

Q. Would you say that you had not?

A. I know my signature.—

Q. Would you say that you had not sworn to it and taken an affidavit?

A. No, I would not.

Q. You would not say that you had and you would not say that you had not?

A. No, sir.

Q. Your memory doesn't serve you on that?

A. No, sir.

Q. You are positive that you never received the tires?

A. I know I never got them.

Q. Why did you sign this letter, then?

A. A man came to me,—Mr.—

Q. Who is the man?

A. Mr. Sweeney, the manager of the United Petroleum Corporation.

Q. In other words, you mean the manager came to you and said, "Will you sign a letter for these tires"?

A. That is right.

Q. Because—

A. He said they were going to send them back to the Firestone Tire and Rubber Company, and they had a chance to make some money. I think $4.67 was their price, and by selling to a dealer they could get more money for them, and he asked if I would buy them. He said he had a dealer and—

Q. In other words, it was a "cover-up" for somebody else?

A. No.

Q. Why did you need to give him this letter, then?

A. I believe Dan The Tire Man, that got the tires,—he admits having the tires through the OPA, and I loaned him the money to pay for the tires.

* * * (This Indictment, p. 6)

Q. Did you buy these tires or didn't you?

A. No, I didn't buy them.

Q. You just—

A. I loaned my money to buy them.

Q. Did you get these tires?

A. No.

Q. Did you actually buy them for yourself?

A. No.

Q. You stated in the letter that you bought them?

A. That is right.

Q. And you don't remember whether you swore to it under oath?

A. No.

Q. You wouldn't say that you didn't?

A. No.

* * * (This Indictment, p. 7)

Q. Had you purchased them?

A. No, I didn't buy them.

Q. But you said you did?

A. In this letter I did. Mr. Sweeney had bought them.

* * * (This Indictment, p. 7)

Q. Did you loan somebody some money to buy the tires?

A. Yes, sir, I did.

Q. And they were the buyers of the tires?

A. That is quite right.

Q. You were not the purchaser of the tires, is that correct?

A. Yes, sir.

Q. Why did you say in your letter that you were the purchaser?

A. I was the go-between. I was buyer of the tires through United; he had already got them when this thing was signed.

Q. Let me ask you again—first of all, you didn't get the tires?

A. No, sir.

Q. Dan, The Tire Man got them?

A. Yes, sir, that is right.

Q. Did Dan, The Tire Man, buy them?

A. I don't know who bought them. Mr. Sweeney bought the tires.

Q. Then the seller bought the tires?

A. The representative of the seller.

Q. The employee of the seller?

A. Sweeney.

Q. Sweeney was what,—what was his position?

A. Manager.

Q. In other words, the manager of the selling company was the real buyer of the tires?

A. That is right.

Q. And did you loan him the money?

A. No, I loaned it to Mr. Roche.

Q. And who is he?

A. Dan, The Tire Man, the ultimate buyer of the tires.

Q. Sweeney sold them to Dan, The Tire Man?

A. That is right.

Q. And you loaned the money to Dan, The Tire Man, to buy them?

A. That is right.

Q. The first purchaser was Sweeney.

A. That is right.

Q. And you financed the transaction?

A. That is quite right.

Q. You didn't buy the tires yourself?

A. No.

* * * (This Indictment, p. 8)

Q. You loaned Dan, The Tire Man, the money?

A. I did, that is right.

Q. How did you lend it to him, as cash or by check?

A. I believe it was cash.

Q. Twenty-seven hundred and fifty dollars?

A. I couldn't answer whether it was check or cash.

Q. But the amount of the loan was $2,750.00?

A. Roughly, yes, sir. I can't tell you exact.

Q. Was the $2,750.00 bill of sale the only one you had with—

A. I said "roughly." I didn't see the price.

Q. Then you don't know whether it was thirteen hundred dollars or twenty-seven hundred dollars?

A. I loaned him the money and—

Q. The bill for the transaction is $1,248.73.

A. I never saw that bill, your Honor.

Q. Does this refer to the transaction of 170 tires for which you loaned the money to Dan, The Tire Man, $1,248.73? (Indicating).

A. Yes.

Q. Does that serve to refresh your memory as to the amount of the loan?

A. No, I just loaned him enough to cover the tires.

Q. So that you loaned him $1,248.73?

A. Yes, sir,—$1,250.00,—whatever it was.

Q. Was that by check or cash?

A. I believe it was cash.

* * * (This Indictment, p. 9)

Q. With respect to this particular transaction for these tires in question, you gave the money to Dan, The Tire Man, to finance?

A. That is right.

Q. Are you positive of that?

A. Yes, sir, that is right.

Q. You are sure of that?

A. Yes.

* * * (This Indictment, p. 10)

Q. As a matter of fact, you never gave this money to Dan, The Tire Man?

A. I didn't hand it to him direct.

Q. You gave it to Evans and a man nemed Sweeney, as stated in that statement?

A. That is right, sure.

3. And the testimony given to the questions asked the defendant, Lee F. Weiler, while under oath in his examination, were false and untrue, and the said Lee F. Weiler then and there knew that such testimony given by him on March 24, 1943, at Philadelphia, in the Eastern District of Pennsylvania, and within the jurisdiction of this Court, concerning a matter that was material in the proceedings had then and there before the said Harry E. Kalodner, Judge, was false.

4. On the contrary notwithstanding, the truth was and is, and the said Lee F. Weiler knew the truth to be:

(a) He had purchased automobile tires on March 16, 1942 from the United Petroleum Corporation;

(b) He had accepted delivery of the said automobile tires on March 16, 1942 from the United Petroleum Corporation;

(c) He had paid for the automobile tires purchased from the United Petroleum Corporation;

(d) He had not loaned any money for the purchase of the aforesaid automobile tires to either Bernard E. Sweeney or Daniel Roatsche, also known as Dan, The Tire Man;

(e) He had not acted as an accommodation party in the entire transaction:

Contrary to the form of the Act of Congress in such case made and provided and against the peace and dignity of the United States of America.

Gerald A. Gleeson,
United States Attorney.

Philadelphia, Pa.
12 May, 1943.

....

....

Foreman.

ARRAIGNMENT AND PLEA.

And now this 25 day of Aug., A. D. 1943, the defendant being arraigned say he is not guilty in the manner and form as he stand indicted, and of this, etc.

BILL OF EXCEPTIONS.

(Filed Oct. 9, 1943.)

Be it Remembered, That in the said term of this Court came the said plaintiff into the said Court, and impleaded the said defendant in a certain Bill of Indictment, etc., in which the said plaintiff declared (prout narr.) and the said defendant pleaded (prout pleas,). And thereupon issue was joined between them.

And afterwards, to wit: at a session of said Court, held at the District aforesaid, before the Honorable T. Blake Kennedy, Judge of the said Court, Specially Presiding the 29th day of September, A. D. 1943, the aforesaid issue between the said parties came to be tried by a jury of the said District for that purpose duly impanelled (prout list of jurors), at which day came as well the said plaintiff as the said defendant by their respective attorneys; and the jurors of the jury aforesaid impanelled to try the said issue, being also called, came and were then and there in due manner chosen and sworn or affirmed, to try the said issue; and upon the trial the counsel for the said respective parties offered their evidence as particularly set forth in the following stenographic notes of testimony, and the Stenographers' Minutes attached hereto; including Gov't. Ex. 1 to 6 incl. and Defts' Ex. 1 & 2, made part hereof by reference and the evidence in the cause being closed, the learned Trial Judge charged the Jury and affirmed and refused to affirm points presented on behalf of the plaintiff and on behalf of the defendant, as hereinafter set forth and as follows:

TESTIMONY.

Philadelphia, Pa., September 28, 1943.

Before Hon. T. Blake Kennedy, J., and a Jury.

Present:

Thomas H. Curtin, Esq., Assistant United States Attorney, for the Government.

Peter P. Zion, Esq., for the Defendant.

(A jury was duly impaneled and sworn.)

(Mr. Curtin made an opening statement to the jury on behalf of the Government.)

Mr. Zion: I reserve my opening address for the defense.

Mr. Curtin: If your Honor please, by stipulation of counsel, we will agree that the only relevant paper to be introduced from the clerk's docket or the record of the previous case is the indictment itself.

Mr. Zion: And a statement, sir, that as to Counts 3 and 4 a verdict of not guilty was directed as to this defendant.

Mr. Curtin: Yes, I stated that. In counts 1 and 2 the jury rendered a verdict of not guilty, and in Counts 3 and 4 the Court directed a verdict of not guilty.

If Your Honor please, I would like to have this indictment in the previous case marked as Government's Exhibit No. 1.

(Indictment in the case of U. S. A. vs Lee F. Weiler and Ellwood T. Evans, No. 10,694, December Sessions, 1942, was marked Government's Exhibit 1.)

It is also stipulated and agreed by and between counsel that Mr. Weiler, the defendant in this particular case, was sworn and did testify at the last trial, which will obviate the necessity of bringing the clerk to prove he was sworn.

Will the court stenographer take the stand, please.

GOVERNMENT'S EVIDENCE.

H. A. B. Schwartz, having been duly sworn, was examined and testified as follows:

Direct-examination.

By Mr. Curtin:

Q. Mr. Schwartz, you are an official court stenographer; is that correct?

A. I am.

Q. Did you take the notes of testimony in the case of the United States vs. Lee Weiler?

A. I did.

Q. When did you take them please?

A. March 24 and March 25, March 25 in particular.

Q. What year?

A. 1943.

Q. Where did you take them?

A. In the District Court here.

Q. You mean in Philadelphia?

A. Philadelphia.

Q. Subsequently, did you transcribe—

A. I did.

Q. Certain parts of these notes?

A. Yes, sir.

Q. This (indicating) represents your transcription from your original notes, does it not?

A. Yes, sir.

Mr. Curtin: I desire to offer this in evidence as Government's Exhibit 2.

Mr. Zion: At this point I object to the offer, sir, unless they offer in evidence the entire testimony by this witness or that that is the entire testimony of this witness. This is a selected portion of the testimony; it is not all the testimony.

THE COURT: You can offer it if you want to, if there is any other testimony which you desire to call attention to.

MR. ZION: I think, sir, it would be the burden of the Government to produce the testimony of this witness taken at the time of the other trial, that they cannot just select certain portions and offer them in evidence as the record.

THE COURT: They don't offer it in evidence as the record; they offer it in evidence as that portion of the record in which they contend that he testified falsely.

MR. ZION: To that extent that is correct, sir, but they cannot, in my opinion, submit that as the record of the man's testimony unless they have all of his testimony.

THE COURT: You have the right to offer additional testimony if you want to. It does not put any additional burden on you, because it is a part of cross-examination.

MR. ZION: I feel, sir, it is their burden.

THE COURT: I agree with you that it is their burden, but I don't think they have to introduce the entire record in this case.

MR. ZION: The only reason I raise that point, sir, is because only certain parts were written up. There are other parts of which I have no record. We would have to burden the stenographer to read the whole thing, which I don't want to do, but I don't think it is fair to the defendant to have only certain things put in. There may have been other things said that are inconsistent with the charge.

THE COURT: We don't know about that. You can bring it out on cross-examination. If it takes a week, we will spend a week to let you present your case. The objection is overruled.

Mr. Zion: Exception. I understand exceptions are automatic.

The Court: They are. It is the rule in my district: I assume it is here.

Mr. Curtin: Your Honor will then allow that to be introduced as Government's Exhibit No. 2?

The Court: Yes.

(Notes of testimony in the case of U. S. A. vs. Lee F. Weiler and Ellwood T. Evans, No. 10,694, December Sessions, 1942, was marked Government's Exhibit 2.)

Mr. Curtin: Your Honor will allow me to read from the pertinent parts? I think we should acquaint the jury with the testimony.

By Mr. Curtin:

Q. Mr. Stenographer, I ask you to turn to Page 8 in the middle starting "By the Court: When was the filing . . ."

I want you to read from then on till I tell you to stop.

NOTE: In order to conform to Rule 75(e) of the Federal Rules of Civil Procedure, and to make it more convenient for this Court, the portions of the Exhibit read into the record at this point (N. T. pp. 7-22, line 13 inclusive,) together with interjections of the Court below and Attorneys for Plaintiff and Defendant, will be found in Government's Exhibit No. 2, (Appendix pages 121a to 142a inclusive) interspersed with the portions of the Exhibit not read into the record.

The portions read into the record will be printed in quoted and indent form, while the interjections will be printed in italics.

(* * * * N. T. pp. 7-22, line 13 inclusive)

Mr. Curtin: Now I ask you to stop because that is all the testimony that I have alleged in the indictment, if your Honor please, bearing on these two or three major points that I have.

Mr. Zion: If the Court please, I move here also that this testimony be stricken out because it shows on its face it is not material to the issue that was before the Court in the former case. In that former case, sir, the indictment alleged certain transactions, the last date of which was January 20, 1942. At the time that this testimony was given the Court had already directed a verdict of not guilty as to the third and fourth counts as to this defendant, which touched on the transaction of January 20, 1942, and all this testimony about which this witness has read, which was given by Mr. Weiler in the other case, had to do with the transaction of March, 1942, some two months after or a month and a half after the last date averred or alleged in the indictment; and, as a matter of fact, as to Counts 1 and 2, the only date given there was, I think, December, 1941, and it is clearly not material to the issue.

The Court: What was the charge in this indictment?

Mr. Zion: The original indictment, sir, was a charge with conspiracy, first, to have a false report or record be given to the agency of the Government, the OPA, which had to do with a bill which they allege was dated December 10, 1941, by the defendants; whereas, as a matter of fact, the sale was December 20, which would bring it after December, and also conspiracy arising out of that, that they should transfer tires in violation of this regulation and also they should not make the return required to be made of your inventory that you had on hand on a certain date—I think it was December 10, 1941—which had to be filed not later than December 31, 1941. The other two counts are out of the case. They had to do with a transaction with a man named Moss on an alleged purchase of tires on January 20, 1942. Those two were dropped out of the case by the direction of the Court before the defense went on; therefore, when Mr. Weiler testified the only issue before the Court, before the jury to pass upon, had to do with what I call the Farbstein transaction and the filing of that report; and since all this testimony relates to something that took place after that date—it was March 16, 1942—it certainly could not be material to the issue. It wasn't even before the Court.

The Court: I think it was relevant to the issue that was being investigated at that time on the trial.

Mr. Zion: May it please the Court, this was an indictment. The investigation was over.

The Court: I mean the trial, of course.

Mr. Curtin: How about his own credibility, if your Honor please? My friend thinks that the jury was to believe anything. Credibility is a big thing.

The Court: The motion is denied.

Mr. Curtin: You may cross-examine.

Cross-examination.

By Mr. Zion:

Q. Mr. Schwartz, you took the testimony of all the witnesses, both of the Government and of the defense in that case, did you not?

A. Yes, sir, the entire trial.

Q. What you have read is not the entire record of the testimony of Mr. Weiler, is it?

A. No, sir; no.

Q. And it is not the entire record of what even appears in the part that was written up?

A. No, sir; no.

Q. Mr. Schwartz, did you at my suggestion, prior to the time of the trial of this case, read through the record of the notes of testimony that you took at the time of the other trial?

A. Yes, sir.

Q. Are you able to state whether or not, up to the time of the close of the Government case in that matter, there had been any evidence introduced by the Government showing any transaction that took place later than January 20, 1942?

Mr. Curtin: That is objected to. The Court has already passed upon the materiality.

The Court: The objection is sustained.

By Mr. Zion:

Q. Mr. Schwartz, turning to the notes of testimony that have been transcribed, turn to page 19, at the top of that page, will you please read the question by Mr. Curtin and the answer?

Mr. Curtin: If your Honor please, I take the osition that what I am proving by the notes of testi ony through the court stenographer is the basis of ny perjury charge. If my friend desires to show any hing contrary, I submit it is a matter of defense. He nust call him as his own witness, sir, to show he did omething different.

The Court: I think it is proper cross-examina ion.

Mr. Curtin: I didn't want the record all cluttered up with all the testimony of two days of the trial.

By Mr. Zion:

Q. Will you please read the questions and answers?

A. "By Mr. Curtin:

"Q. Inasmuch as you are a distributor we have purchased from you—

"A. That is right.

"Q. Was that a correct statement?

"A. Yes."

Q. That is all. The Government already put in the rest. Now, will you turn to page 20 and read from the top of the page. It starts with an answer by Mr. Weiler.

A. "A. I never received them. My notion is a purchaser—if you receive and pay for them.

"Q. You mean to say you purchased them for somebody else?

"A."—

Q. Let me interrupt you, please, Mr. Schwartz. Let us go back to the bottom of page 19, beginning with the second question from the bottom of the page "Did you purchase" and so forth.

A. "By Mr. Curtin:

"Q. Did you purchase them for anybody else?

"A. Yes.

"Q. What do you mean that you didn't purchase them?

"A. I never received them. My notion is a purchaser—if you receive and pay for them.

"Q. You mean to say that you purchased them for somebody else?

"A. Yes, sir.

"Q. And who paid for them?

"A. When they were sold I was paid off. Mr. Roche sold the tires.

"Q. Why were you paid off?

"A. I loaned Mr. Roche the money to buy them. I didn't buy them, and I didn't pay for them direct."

Q. That is enough there. The Government put the rest in. Going to page 23, the seventh line from the bottom of the page, question by Mr. Curtin, "As a matter of fact . . ."

A. "By Mr. Curtin:

"Q. As a matter of fact, you testified that you supplied the money for this transaction?

"Mr Zion: He said that before.

"The Witness: I did.

"By Mr. Curtin:

"Q. You supplied $2,750.00 for this bill?

"A. This is right.

"Q. And you got the tires?

"A. I did not.

"Q. You had them transferred to somebody else?

"A. I did not."

Q. That is all at that point. Beginning at the top of page 25, the first question there, "By the Court: Why did you give. . . "

A. "By The Court:

"Q. Why did you give the money to Sweeney?

"A. He was the one who made the transaction for the United Petroleum Corporation.

"Q. Why didn't they sell the tires to Dan, The Tire Man?

"A. No,—I couldn't say. He could have bought them direct if he had money."

Q. That is all at that point. Skipping down to the next answer, read the next answer, "He wanted . . . ."

A. "A. He wanted me to buy them, and I didn't want them. Dan was in my office, and he said he would like to have them.

"Q. Why didn't you tell Dan to transact the purchase of the tires direct?

"A. He didn't have the money.

"Q. Why could you not lend him the money to buy them under his own name?

"A. He could have done it."

Q. That is all on that page. Now, go on to the next page, page 36. Go to the second question from the top of the page, beginning with "Yes".

A. "A. Yes, sir.

"Q. And 'will you lend me the money'? Is that what happened?—he said, 'I want to buy these tires'?

"A. Yes. But he couldn't buy them from the United at the same price. Dan Roche is a dealer and not a distributor. I could purchase them as a distributor, and that is the reason for that order. He was a dealer."

Q. That is all up to that point until the question below that, the answer starting with "That is right".

A. "A. That is right, he could have sold them if Dan Roche was a—"

The Court: What is the question?

The Witness:

"Q. Dan could have bought them?

"A. No, Dan could not have bought them.

"Q. Because that was a violation of the regulations of the OPA, is that right?

"A. That is right, he could have sold them if Dan Roche was a—nobody quite understood the regulations,—but I could buy them."

By Mr. Zion:

Q. That is all on that page. Now, go on to the next page, page 37, beginning with the question, "So that you had to help or assist him . . . ."

A. "Q. So that you had to help or assist him to circumvent the OPA?

"A. It wasn't circumventing the OPA; he could buy from them from me and sell them."

Q. That is all at that point. Now, turn to page 39, the statement at the bottom of the page, by Mr. Zion.

Mr. Curtin: If your Honor please—

Mr. Zion: If wish to show, sir, that at that time I moved to strike that testimony because it was irrelevant.

Mr. Curtin: I submit, if your Honor please, what motion Mr. Zion made at the previous trial has nothing to do with the perjury charge here.

The Court: That has nothing to do with it.

Mr. Zion: In other words, he objects to the question—

The Court: You are reading something in the way of a motion in the record. That wasn't anything in the way of testimony.

Mr. Zion: To show, sir, the basis upon which that testimony was put in; to show, sir, that at that time Mr. Curtin did not put it in as being material to the issue of the indictment, merely on the question, as he called it then, of credibility, to sustain our position that it was not material to the issue of the charge in that indictment. This was a matter that took place after the last date of the indictment and after any date set forth in the testimony put forth by the Government.

The Court: The objection is sustained.

By Mr. Zion:

Q. Turning to page 40, beginning with the question by the Court, "When you gave this . . . . "

A. "By The Court:
"When you gave this $2,750.00 to Evans and Sweeney, about when was that?

"A. The 16th of March, I believe.

"Q. The 16th of March,—don't you know?

"A. Pardon me,—I didn't give it to Sweeney; I left it with Evans.

"Q. And what about the balance, the other $1,500.00?

"A. They had a number of tires which they were trying to sell to me; I didn't know the exact number of tires, and that is why I left that amount.

"Q. And that is on March 16th?

"A. Yes, sir. I never knew how many tires they had until the United came over eight days later and asked me to sign this paper,—which this gentleman (indicating) can testify I did. The United never gave me a bill because I never bought anything from them."

Q. Mr. Schwartz, the notes that you transcribed, was that all the testimony given by Mr. Weiler in the direct examination and the cross-examination on the question of that transaction of March 16, 1942?

Mr. Curtin: I object.

The Court: The objection is overruled.

A. I believe that is the complete testimony as to that transaction.

Mr. Zion: If the Court please, you have already ruled that I could not ask this witness, who is a court stenographer, as to whether or not at the last trial in the Government case they had produced any evidence whatever to show any transaction after January 20, 1942. That forces me to make a motion I didn't want to make. I, therefore, ask that there be offered in evidence all of the testimony of the Government in their case in chief in the other case, for the purpose of showing that there was not in issue any transaction that took place after January 20, 1942.

The Court: The motion is denied. That is part of the defense if you wish to show it.

Mr. Zion: Of course, sir, that offer will come in my defense, but I wanted it here because of the objection of the United States Attorney when I asked a question of this witness. We could have saved all that examination and all that effort, because he had read through the notes and could answer. It would save a great deal of time, sir, if you would permit him to say that there was no such testimony or that there was.

The Court: I know, but you are quarreling with the rules of evidence.

Mr. Zion: I am not quarreling with the rules.

The Court: Yes, you are. You claim that he should not have objected.

Mr. Zion: I say it is material to this case to show whether or not it was material in the other case.

Mr. Schwartz: Will you please remain in the courtroom, because I will have to call you back.

That is all.

JOSEPH J. GABEL, having been duly sworn, was examined and testified as follows:

Direct-examination.

By MR. CURTIN:

Q. What is your name?

A. Joseph J. Gabel.

Q. You are connected, are you not, with the United Petroleum Corporation?

A. I am president of that corporation.

Q. Do you know the defendant, Lee Weiler?

A. I met him once.

Q. I beg your pardon?

A. I met him once.

Q. Where was that?

A. In my office.

Q. Where is your office?

A. 2227 Bryn Mawr Avenue.

Q. Philadelphia?

A. Philadelphia.

Q. I show you now what I will mark for identification as Government's Exhibit 3 and ask you if you ever saw that letter before.

(Letter dated March 16, 1942, on letterhead of Brewerytown Garage, signed Bob Hastings, addressed to United Petroleum Corp., was marked Government's Exhibit 3 for identification.)

A. I don't recall whether I ever saw that particular letter.

MR. CURTIN: I ask that that just be laid aside temporarily, sir.

By MR. CURTIN:

Q. I show you now what I have marked for identification as Government's Exhibit 4 and ask you if you ever saw that letter before.

(Letter dated March 24, 1942, from Lee L. Weiler to United Petroleum Corporation, was marked Government's Exhibit 4 for identification.)

A. Yes, I did.

Q. Prior to that letter was Mr. Weiler at your place of business; can you recall?

A. Yes, he was.

Q. I want you to tell his Honor and members of the jury briefly what transpired at Mr. Weiler's visit to your place of business in Philadelphia prior to that letter, which was about what time, sir, again?

A. Well, that was in March of 1942, and I believe the same day or the day before this letter was written.

Q. He came to your place of business in March, 1942. Now, tell his Honor what happened.

A. He came at my request.

By Mr. Zion:

Q. Did you answer that, he came the same day as that letter?

A. The same day or the day before. He came at my request because I had been apprised of the fact that there was a transaction made on tires to the Brewerytown Garage, Lee F. Weiler; and under the Act—

By Mr. Curtin:

Q. We won't go into your legal interpretation.

A. That is right, I won't give you my interpretation, but I wanted to make sure that the regulations were being complied with.

Mr. Zion: I ask that that be stricken out, sir.

By Mr. Curtin:

Q. Did you send for Mr. Weiler?

A. I sent for Mr. Weiler.

Q. Tell us what you did with Mr. Weiler?

A. And I told Mr. Weiler in my office that I understood the tires has been sold to him, and that I wanted a letter proving that he was competent under the Act to buy those tires, that otherwise I would have to either report the transaction to the OPA or ask that the tires be returned, because, in my opinion, I didn't know whether it was all right or not, but I wanted written evidence; and as a result of that this letter was written.

Q. Do you recall where it was written?

A. We have a notary in our office, but I wanted it written on the stationery of the Brewerytown Garage, of Lee F. Weiler, and I sent the notary down, as I recall, to the office of Lee F. Weiler to get it typed on his stationery and have it notarized.

Q. You didn't see Mr. Weiler sign that particular letter himself?

A. I was not there when he signed it.

Q. The notary was there. I show you another paper which I have marked as G-5 for the moment and ask you if that is one of your own records.

(Paper dated March 16, 1942, on bill head of United Petroleum Corporation, was marked Government's Exhibit 5 for identification.)

A. That is our stationery, yes.

Q. Is that the duplicate bill head that you used in March, 1942?

Mr. Zion: I object, sir, to the question. It is certainly not material. He may testify if he prepared this bill or it was done under his supervision. He certainly can't testify nor is it material whether it was a duplicate bill that they used in their business or not.

The Court: Overruled.

By Mr. Curtin:

Q. What do you know of the records of your own business? Just tell us what you know about them.

Mr. Zion: I object, sir, to that question.

A. I know the records in the course of the transactions of our business. I know what records we use. I wouldn't know each particular transaction at the minute that it is made, but I can identify this as being one of our bill heads.

Q. Is Mr. Oates your office manager here?

A. Mr. Oates is our office manager.

Q. We will pass that for Mr. Oates. Do you recall how many tires you sold to Mr. Weiler or trading as Brewerytown Garage?

Mr. Zion: That is objected to, sir, unless he can testify that he made the sale or was personally involved in the sale. He can't testify from his records, sir.

The Court: Why not?

Mr. Zion: Because that would be hearsay evidence entirely.

The Court: No, his records would be competent.

Mr. Zion: Then, he should produce the records and show, if he is the one who kept those records.

Mr. Curtin: I will pass that question because I have Mr. Oates here.

By Mr. Curtin:

Q. Did you have an employee named Sweeney?

A. Yes, I did.

Q. He is present in court, is he not?

A. Yes, he is.

Q. What was his capacity?

A. He was manager of the tire department.

Mr. Curtin: You may cross-examine.

Cross-examination.

By Mr. Zion:

Q. Mr. Gabel, when you called Mr. Weiler in to see you, the transaction, as far as the sale of these tires, had already been completed?

A. That is correct.

Q. Your company had been paid?

A. As far as my knowledge at that time was concerned. I didn't know, but the transaction had been completed in the sense that delivery, I understood, had been made.

Q. And you called Mr. Weiler after the transaction was completed?

A. After as much of the transaction as I knew of was completed.

Q. In other words, you don't know very much about it yourself except what others have told you?

A. I know the transaction had been made.

Q. By the way, do you know how long after the transaction was had you called Mr. Weiler in to see you?

A. I can't recall just how long after the transaction had actually been completed.

Q. Would you say it was within about a week?

A. I would think so, a week or ten days.

Q. Is it usual to call in a buyer of tires after the transaction is made in your business, Mr. Gabel?

A. Well, the usual transaction is made with someone whose name we know something about, and while I don't want to get into the terminology of the Act again, because I am not competent to talk about it, I knew that there were certain restrictions upon us as to whom we could sell tires, and not knowing personally the name of Lee F. Weiler, I wanted to make sure that the transaction fitted into the Act.

Q. In other words, you did ascertain that Mr. Weiler was a dealer and had a right to buy tires; is that correct?

A. Well, I will have to give an explanation of that, too.

Q. Just answer yes or no.

A. I called our attorney.

Q. Mr. Gabel, I ask you to please answer this question.

The Court: You can't compel him to answer "yes".

Mr. Zion: He can answer that yes or no, sir, whether or not he was a dealer in tires.

The Court: He has to explain what he ascertained.

Mr. Zion: I would like him to answer my question, sir.

The Court: Don't be so contentious. (Addressing the witness) Go ahead make your explanation.

Mr. Zion: Note my objection, sir, to his not answering yes or no.

The Court: Yes.

The Witness: I called our attorney and I asked him what the legal status would be if we sold a tire to someone or sold tires to someone who held themselves out to be wholesalers under the meaning of the Act, and if subsequently it developed that he wasn't a wholesaler at all and that we had made this transaction in violation of the Act, and he called the OPA and ascertained that if we—

Mr. Zion: If the Court please, here is a conversation had with his attorney. I ask that that be stricken. The conversation with his attorney is certainly not material.

The Court: At the present time he will not be able to state what somebody found out by telephoning the OPA. His other statement of what he did and the reason for it may stand.

The Witness: I might add that my attorney told me—

Mr. Curtin: We don't want what your attorney told you.

By Mr. Zion:

Q. Mr. Gabel, but as a result of all this, you did find that Mr. Weiler was a dealer in tires; is that correct?

Mr. Curtin: If your Honor please, he is objecting to the witness telling it.

Mr. Zion: Mr. Curtin, do you mind if I try my case in my own way? I may be very poor at it, but let me do it my way.

Mr. Curtin: If your Honor please, he is objecting—

Mr. Zion: I didn't object. I ask the same question I asked before.

The Court: You wanted him to answer yes or no whether he did or whether he didn't.

Mr. Zion: My question is, As a result of that can you say that you found he was a dealer or not a dealer? That is what I asked him first.

The Court: You may answer.

The Witness: Do you mind repeating your question?

By Mr. Zion:

Q. Did you then find out, Mr. Gabel, that Mr. Weiler was a dealer in automobile tires?

A. Yes, I did.

Mr. Zion: That is all I wanted to know in the first place.

Re-direct-examination.

By Mr. Curtin:

Q. With respect to this particular transaction, did you know or was anything ever said to you that anybody else but Mr. Weller was purchasing these tires at any time?

Mr. Zion: I object to that, sir. It is not proper re-direct-examination nor is it material.

The Court: The objection is overruled. He can recall him for that purpose. You may answer.

A. No, nothing like that was ever said. The transaction was supposed to be with Mr. Weiler.

Mr. Curtin: That is all.

Mr. Zion: No further questions.

Mr. Curtin: Mr. Oates.

John F. Oates, having been duly sworn, was examined and testified as follows:

Direct-examination.

By Mr. Curtin:

Q. Mr. Oates, you are connected with the office of United Petroleum Corporation, are you not?

A. Yes, I am.

Q. In what capacity?

A. As office manager.

Q. By the way, you are also a notary public, are you not?

A. That is right.

Q. I show you what has been marked for identification as Government's exhibit 3 and ask you if, in your capacity as office manager, you recall ever having received that particular communication.

A. I couldn't say that I recall it, no.

Q. You can't say you recall it now. I will pass that temporarily. I show you Government's Exhibit No. 4, and ask you, as office manager, do you recall ever having seen that.

A. Yes, I have seen this one.

Q. What was your answer to that, please?

A. Yes, I have seen this one. I notarized that.

Q. That particular document bears your signature, does it not?

A. That is right.

Q. And it bears your signature as a notary public?

A. That is right.

Q. Do you know the defendant, Lee Weiler?

A. Yes, I do.

Q. Did you see him sign that particular instrument?

A. Yes, I did.

Q. Did you take his affidavit to that particular instrument?

A. Yes, I did.

Mr. Curtin: With your Honor's permission, I would like to offer this in evidence.

Mr. Zion: Will you note my objection, sir, on the ground of lack of materiality, because on the other, also, he admitted signing that paper and admitted taking affidavits, so it is not material here.

The Court: It takes in the whole picture.

Mr. Zion: Anyhow, note my objection, sir.

(Letter dated March 24, 1942, signed by Lee F. Weiler, addressed to United Petroleum Corporation, was received in evidence as Government's Exhibit 4.)

Mr. Curtin: Your Honor will allow me to have it read to the jury, please.

By Mr. Curtin:

Q. Will you please read it, Mr. Oates.

A. (Reading) "March 24, 1942
"United Petroleum Corporation,
"2227 Bryn Mawr Ave.,
"Phila., Pa.
"Gentlemen:

"We are wholesalers of tires under the meaning of the Tire Rationing Regulation Act as amended February 19, 1942. We are therefore entitled to buy new tires and tubes from a distributor under the meaning of the Act.

"In as much as you are a distributor we have purchased from you 150 600x16 Standard and Convoy tires and 20 625x16 Standard tires under date of March 16.

"We are writing this letter as per your request.

"Very truly yours
(Signed) Lee F. Weiler
Brewerytown Garage."

Q. What is at the lefthand bottom?

A. "Subscribed and sworn to before me this 24th day of March 1942", my signature and seal.

Q. And you have affixed your seal thereto?

A. That is right.

Q. At the particular time when you took that affidavit, was anything said to you, as office manager, about this purchase being for the account of somebody else?

A. No.

Mr. Zion: Objected to. There is no evidence here by anybody it was so stated.

The Witness: No, nothing said.

By Mr. Curtin:

Q. I show you what I have marked for identification as Government's Exhibit No. 5 and ask you if that is one of your official records of the United Petroleum Corporation?

A. Yes, that is one of them.

Q. What is that particular record?

Mr. Zion: I have no objecting to his saying it is a bill head, or something like that, but as to its details, I object, unless he prepared it or if he was the one under whose supervision it was prepared.

The Court: We will see what he knows about it.

The Witness: I have seen it before and I recognize the writing.

By The Court:

Q. Tell where you saw it and all about it.

A. The bill was prepared by Meyer Sandburg, who at that time worked for us.

Q. Are you familiar with his handwriting?

A. Yes, I am.

By Mr. Curtin:

Q. Was he under your supervision at that time?

A. Yes, he was.

Q. He was under your supervision. Go ahead.

A. He made the bill, and it is marked "Paid", receipted by Mr. Sweeney.

Q. He was also an employee of yours at that particular time?

A. Yes.

Q. Is that one of your official records, that particular exhibit?

A. This is a copy of it, yes.

Q. Can you tell his Honor and the members of the jury how many copies you would make or just what you do with it, please?

A. We would make two, as a rule. One of them would go to the purchaser and we would keep a copy.

Q. That one that you have in your hand, is that the copy or the original?

A. That would be the copy.

Q. In other words, that is the one that would normally be retained by yourself, is it not?

A. Yes.

Mr. Curtin: I ask permission to offer this particular exhibit in evidence.

Mr. Zion: I object, sir, because it has not been properly proven. There is no one here who has testified that such a sale was made. He has merely testified the practice in his office was to have such a bill.

By The Court:

Q. Is this bill a part of the official records of your company?

A. Yes, sir.

The Court: The objection is overruled.

(Paper dated March 16, 1942, on bill head of United Petroleum Corporation, was received in evidence as Government's Exhibit 5.)

Mr. Curtin: Your Honor will allow me to have that read and shown to the jury?

By Mr. Curtin:

Q. Will you please, Mr. Oates, do that for me?

A. It is a bill dated March 16.

Mr. Zion: Note my objection also, sir, to the reading of the bill, which is consistent with the other objection.

The Witness: It is a bill dated March 16, of the Brewerytown Garage 31st and Thompson Street, for 150 - 600-16 Standard and Convoy tires. Do you want all the extensions?

By Mr. Curtin:

Q. Just give me the items and I will let the jury see the bill itself.

A. It is for 150 600-16 Standard and Convoy tires; and 20 625-650-16 Standard tires.

Mr. Curtin: I ask permission to let the jury see these two exhibits while counsel cross examines.

Mr. Zion: Are you through with the witness?

Mr. Curtin: Yes.

Cross-examination.

By Mr. Zion:

Q. Mr. Oates, you do not know just where this bill that is marked G-5, as being the bill head of the United Petroleum Corporation, was prepared? Are you able to state by looking at this bill just where, physically, this bill was prepared?

A. I would say it was in the office.

Q. Do you know?

A. No, I don't.

Q. You don't know where it was prepared. You weren't there when it was prepared, were you?

A. No.

Q. All you know about this sale is what someone told you: is that right, Mr. Oates?

A. That is right.

Q. Who told you about this sale first? Was it Mr. Sweeney?

A. I am afraid I don't recall.

Q. Are you able to tell whether the moneys that were paid were paid by cash or by check?

A. I am pretty sure it was cash.

Q. Do you know where the money was paid?

A. No. I believe Mr. Sweeney brought it in with him into the office.

Q. It wasn't paid to the office?

A. No, I think he brought it into the office.

Q. Do you happen to know where Mr. Sweeney got that money?

A. No, I wouldn't know.

Mr. Curtin: If your Honor please, Mr. Sweeney is here. I intend to call him. It is a matter of wasting time.

Mr. Zion: If the Court please, I object to the comment about wasting time.

The Court: Proceed.

By Mr. Zion:

Q. Mr. Oates, therefore, all you know about this bill, is that it is a record, it seems to be a record, of your office?

A. It went through the regular channels, yes, sir.

Mr. Zion: I renew my objection to the introduction in evidence of that bill.

The Court: Overruled. It is admissible as a part of the office records.

Mr. Zion: Office records are not in issue here.

The Court: I don't care whether they are in issue or not. They don't have to be in issue. The proposition of introducing office records now is a well-known rule. If they are relevant at all, they may be proven to be from the regular files in the office.

Mr. Zion: The issue here is whether or not we purchased these tires.

The Court: No matter what the issue is. It is a question whether they are admissible or not.

Mr. Zion: Very well, sir.

By Mr. Zion:

Q. Mr. Oates, you went to Mr. Weiler's place, I believe, on March 24, 1942; is that correct? That is the date that this affidavit appears here?

A. Yes.

Q. You went there at the direction of whom?

A. Mr. Gabel, I believe.

Q. On that day the sale that you are speaking of had taken place some time before; isn't that correct?

A. That is correct.

Q. According to the record that you produced, it shows the sale as of March 16, 1942?

A. That is right.

Q. You proceeded to Mr. Weiler's garage on the 24th, some eight days later?

A. That is right.

Q. At that time this so-called sale had been completed?

A. That is right.

Q. And the tires were no longer i the possession of the United Petroleum Company?

A. That is right.

Q. The United Petroleum Company had been paid whatever the purchase price was for those tires?

A. Yes, I believe that is right.

Q. Did you have a Bible with you when you went down to—

A. No, I didn't.

Q. So when you took this affidavit there was no oath on the Bible, or anything like that, was there?

A. No—an affirmation.

Mr. Zion: No other questions.

Mr. Curtin: Mr. Sweeney.

Bernard E. Sweeney, having been duly sworn, was examined and testified as follows:

Direct-examination.

By Mr. Curtin:

Q. Mr. Sweeney, you were in 1942 connected with the United Petroleum Corporation, Wynnefield and Bryn Mawr Avenues, Philadelphia; is that correct?

A. Yes, sir.

Q. In what capacity?

A. Manager of the tire department.

Q. You are presently employed in the Navy Yard, aren't you?

A. Yes, sir.

Q. With respect to this particular transaction we are talking about, the purchase of the 150 600-16's and the 20 625-16's, will you tell his Honor and the members of the jury briefly who made that transaction, what you had to do with it, who paid for it, and everything you know about it?

A. We were liquidating the tire department at the time, and to return tires to the Government through the Firestone Tire and Rubber Company we got a five per cent handling charge. As manager of the tire department it was decidedly to my advantage to find someone who had a legal right to buy these tires. Weiler had that right and had the money to pay for them.

Q. We won't go into that, whether he had the money or not. You went to see Weiler, did you not?

A. That is right.

Q. Or did Weiler come to see you? I don't want your conclusions; that is what I am trying to get at.

A. I think I went to Weiler's. I am not quite sure. I was on the street all the time or most of the time.

Q. Tell his Honor and members of the jury briefly what happened with respect to this tire deal.

A. And I sold him this bill of goods and delivered—rather, he called for them, his truck called for them, at our plant in Paulsboro. I delivered the tires and was paid for them.

Q. You were paid how much?

A. I don't recall the exact amount.

Q. Was it cash or check?

A. It was cash, and it was the wholesale price at the time, the prevailing wholesale price.

Q. You have gone a little bit too rapidly for me in this thing.

With your Honor's permission, I would like to go back over it.

To the best of your recollection, you called at Weiler's place of business relative to the sale of these tires: is that correct?

A. Yes, sir.

Q. Did you discuss with him price of delivery? Tell his Honor what you talked with him about.

A. It has been quite a while ago, and I want to make sure of everything that I say, so I don't want to guess at everything.

Q. All right.

A. In the usual course of my work I called on Weiler. We had these tires, and it was an opportunity for the company to make a profit in excess of the handling charge that the government allowed, and it seemed like a good deal. In fact, we thought about the thing for several days before the deal was made, and finally the tires were sold, and when he called for them we delivered them to him.

Q. In other words, you made an agreement as to price, did you not? With whom did you make that agreement?

A. With Weiler.

Q. That is the defendant here, is it not?

A. Right.

Q. How were the tires delivered? In what manner?

A. His truck called for them.

Q. Where did his truck call for the tires?

A. At our New Jersey plant at Paulsboro, New Jersey.

Q. Were you present?

A. Yes, sir.

Q. What did you do with the tires?

A. Simply checked them on the truck.

Q. Who was on the truck?

A. Evans was on the truck.

Q. Who was Evans?

A. Evans was one of the men that worked at Weiler's place. He is the man that paid me for the tires.

Q. He paid you in cash for the tires, did he not?

A. In cash for the tires.

Q. I show you what has been offered in evidence as Government's Exhibit No. 5 and ask you if you ever saw that particular exhibit before.

A. Yes, sir.

Q. As a matter of fact, is that one of the official records of your corporation?

A. Yes, sir.

Q. That is the duplicate of the receipt, is it not, for the sale of these particular tires?

A. Yes, sir.

Q. Can you tell us whether or not your initials are on that?

A. Yes, sir.

Q. And you received the cash as designated by that?

A. Yes, sir.

Q. And whom did you give the original to, the original of that duplicate?

A. I am not sure whether it was Weiler or Evans.

Mr. Curtin: I will have to ask that that be stricken out, if your Honor please. I agree that that be stricken.

By Mr. Curtin:

Q. When you received the cash, did you give a receipt to Mr. Evans for it?

A. That I don't know. That question came up before.

Q. But on the duplicate appears your initials; is that correct?

A. That is right, yes, sir.

Q. And that is the record of your corporation, is it not?

A. Yes, sir.

Q. Now, Mr. Sweeney, did you ever buy any of these tires in your own account?

A. No, sir.

Q. Did you ever have any agreement or understanding with Mr. Weiler of any account with respect to these tires?

A. No, sir.

Q. Did you ever handle them?

A. No, sir.

Q. Did you ever receive any?

A. I never received any tires for anybody all during the time I was with the United Petroleum.

Q. Did you ever put up any money?

A. No, sir, absolutely.

Q. In other words, as far as the entire transaction is concerned, you appeared in nowise except as the superintendent of the United Corporation, selling for their best advantage?

A. That is right.

Q. Did you receive any additional moneys for this deal?

A. No, sir. I received a salary; I didn't receive any commissions.

Q. In other words, as far as this particular deal was concerned, you had nothing to do with it except in your official capacity as superintendent of the United Petroleum Corporation?

A. Yes, sir.

Q. By the way, that is a rather extensive corporation, is it not?

A. Yes, they were quite large.

Q. At that particular time?

A. Yes.

Q. How many branches and service stations do they have, can you recall, approximately?

A. The whole chain, I imagine, has several hundred. We had about a hundred in Philadelphia.

Q. A hundred, at least, in the Philadelphia area?

A. That is right.

Q. And you were the superintendent of the tire department of all this chain, is that right?

A. That is right.

Q. In this particular transaction, I repeat, did you have anything to do with it except in your official capacity?

A. That is right.

Cross-examination.

By Mr. Zion:

Q. Mr. Sweeney, you were manager of the tire department of the United Petroleum Company?

A. Yes, sir.

Q. As far as this deal was concerned, you called at Mr. Weiler's place of business and discussed this purchase with him?

A. That is right.

Q. You stated that the tires were delivered at a place in New Jersey. Where in New Jersey?

A. Paulsboro, New Jersey, the United Petroleum Corporation's Jersey plant.

Q. Where is that?

A. Paulsboro, New Jersey.

Q. Who was there when these tires were delivered?

A. Well, the man that received the tires and myself and the United Petroleum organization who worked there.

Q. Was Mr. Roche there, Dan Roche, at the time?

A. I don't know. He might have been. He and I were spending a lot of time together during that time, and that is not particularly clear to me. He may have gone with me; I forget.

Q. Dan Roche was not employed by the United Petroleum Corporation?

A. No, sir, excepting that he bought tires from me all the time.

Q. Dan Roche had no reason to be present as a representative of the seller when these tires were delivered?

Mr. Curtin: Just a minute. There is no testimony that Roche was.

Mr. Zion: He says he is not sure; he may have been there.

The Court: I am permitting you to go ahead, but you asked him whether he had any occasion to be there.

Mr. Curtin: He said he didn't know whether he was there.

By Mr. Zion:

Q. On the day these tires were delivered, was Dan Roche employed in any capacity by the United Petroleum Corporation?

A. That day or any other day he was never employed by the United Petroleum Corporation.

Q. As a matter of fact, he has bought tires from you as manager of the United Petroleum Corporation? He was also a dealer in tires, was he not?

A. He was a dealer and bought tires; that is right.

Q. You and he were rather friendly?

A. Very friendly.

Q. And he was with you quite a bit?

A. That is right.

Q. Mr. Sweeney, you stated that Mr. Weiler's truck called for these tires at Paulsboro, New Jersey. How did you know it was Mr. Weiler's truck?

A. I didn't, but Mr. Weiler's man was on the truck and he had the money to pay for the tires.

Q. You didn't know it was Mr. Weiler's truck at all, did you?

A. I don't know to this day that it was Mr. Weiler's truck, excepting that particular truck had been around to the garage.

Q. In other words, you saw Mr. Evans on a truck, and Mr. Evans, who worked for Weiler, called at Paulsboro on that day for the tires in a truck?

A. I saw Mr. Evans in a truck that had been around the garage, parked in there. It was painted red—an old jalopy. They had been using it. If it is theirs, I don't know, but it was a truck they had use of. I am sure of that.

Q. How do you know?

A. I saw it go in and out with Weiler's emlpoyees driving it.

Q. He has a public garage there, has he not?

A. It is his garage.

Q. A public garage where they store cars and trucks. Therefore, you don't know whether it was Mr. Weiler's truck or not?

A. Weiler told me he would send his truck after them, and that was the truck that came.

Q. In other words, a truck came with Mr. Evans on it, and Mr. Evans had cash?

A. That is right.

Q. As a matter of fact, how much money did Mr. Evans have and give you at that time? Without referring to the bill, can you tell me?

A. The amount that is on the bill.

Q. As a matter of fact, wasn't it $2,750?

A. It certainly was not.

Q. Was there any amount above the amount of that bill?

A. No, sir.

Q. Mr. Sweeney, you know Mr. Roche, who was present at the time these tires were delivered, wasn't he?

A. I don't know. Maybe he was. I am not so sure about it.

Q. As a matter of fact, didn't Mr. Roche come with Mr. Evans on that truck?

A. I couldn't say clearly. I wouldn't say he didn't. He probably was: I am not sure.

Q. There were 170 tires. That is quite a quantity of tires. It would have to be a pretty good sized truck to take 170 tires?

A. It was a good sized truck.

Q. It was painted red?

A. That is right.

Q. Do you happen to know what kind of truck Mr. Weiler's own truck was? You say you were around the garage quite a bit. Did you know a half-ton truck was the only truck he had of his own?

A. All I know is what he told me.

Q. Mr. Sweeney, after the tires were loaded on this truck, who drove away with the truck?

A. Evans drove the truck.

Q. Only Evans?

A. I don't know. I think there was two or three men on there. It was dark and it was raining.

Q. Mr. Sweeney, may I ask this question: As a matter of fact, when that truck went away, on that truck were there not a Mr. Evans, a Mr. Roche, and a Mr. Sweeney? You went back to Philadelphia on that truck, did you not?

A. I certainly did not.

Q. Mr. Roche didn't go back on that truck?

A. I don't know about Mr. Roche. You can ask him when he is on the stand.

Q. Mr. Roche was there. Did he leave with those tires?

A. I don't remember.

Q. By the way, you know Mr. Weiler fairly well, don't you?

A. I met Mr. Weiler a couple of years ago at a Firestone meeting, and I met him subsequently when I done some business with him. I don't know him well.

Q. You testified you knew this truck, that you saw his men driving in and out. You must have been there frequently.

A. I bought tires from Mr. Weiler, and I was in his garage on several days in regard to this deal, as you would, doing business with a man, you get to know him a little bit.

Q. The Government produced a paper which they had marked G-3. On it appears the name Bob Hastings.

A. Yes.

Q. Was that paper delivered to you at the time the tires were sold and delivered to this truck, to Mr. Evans?

A. The only answer I can make to that signature—

Q. I didn't ask you about the signature; I asked you a question. Was that paper delivered to you or turned over to you at Paulsboro, New Jersey, at the time when these tires were delivered and loaded on that truck?

A. No, sir.

Q. Before that time?

A. It was before that time.

Q. Where was that paper delivered to you? In Paulsboro?

A. In Le Weiler's garage.

Mr. Zion: May I see that paper a minute, please?

(Paper handed to Mr. Zion.)

Q. That is not Mr. Weiler's signature, is it?

A. Mr. Weiler gave me that paper.

Q. Is Mr. Weiler's name on it?

A. Apparently the person who signed it had a right to sign it.

Q. Please answer my question. Is Mr. Weiler's name on it?

A. I don't know, but that signature is not Weiler.

Q. You were dealing with Weiler. You knew he was the one. Why did you accept a paper signed Bob Hastings?

A. For the same reason that the Firestone Tire and Rubber Company would accept a purchase order from me for the United Petroleum Company, as Sweeney. I am not United Petroleum.

Q. You just said that Mr. Weiler gave you this paper personally.

A. That is right.

Q. Wasn't it unusual that Mr. Weiler of the Brewerytown Garage should hand you a paper signed by Bob Hastings?

A. Not at all unusual.

Q. Didn't that strike you as funny?

A. I don't think so.

Q. As a matter of fact, Mr. Sweeney, didn't Mr. Roche and Mr. Evans and you, present at Paulsboro, New Jersey, at the time that these tires were taken from the United Petroleum Company's warehouse and put on a truck—wasn't the arrangement and isn't it a fact that you received $2,750 in cash and that you knew that those tires were not being delivered to or received by Mr. Weiler?

A. That is absolutely a lie.

Q. Mr. Sweeney, you had nothing to do with or no interest in these tires other than selling them for your employer at $1,248?

A. That is right; that was my job and I was doing it.

Q. You didn't receive anything above $1,248 from either Evans or Roche or anyone else?

A. I didn't even receive a cigar, let alone any money.

Q. There was no $2,750 in cash passed over to you by Mr. Evans or Mr. Roche?

A. There certainly was not.

Q. When you delivered these tires at Paulsboro, did anybody sign a receipt showing that they had received them?

A. I don't think so.

Q. Is it usual to deliver so many tires, 178, a big transaction, without getting a receipt from the party to whom you delivered them to show they had been delivered?

A. It is quite usual, if a man buys a bill of goods and pays you cash for it. You have got the money and he has got the goods.

Q. You didn't want a receipt to show that they actually received those tires?

A. I didn't need a receipt; I had the cash.

Q. I am not asking you about a receipt that you give to somebody for money; I am talking about a receipt to show that they received the goods.

A. He certainly wouldn't have paid for them if he didn't receive them.

Q. I am not arguing the question; I am asking you did you give them a receipt or get a receipt?

A. No, sir. I didn't need it.

Q. You did think it was necessary to go to Mr. Weiler's garage eight days later to have him sign a statement to show that he had purchased these tires; is that correct?

Mr. Curtis: If your Honor please, there is no testimony that he went. The testimony is that Mr. Oates went.

By Mr. Zion:

Q. Were you present when Mr. Oates was at Mr. Weiler's garage to get that signature on Government's Exhibit G-4, dated March 24, 1942? Were you not present when that paper was signed by Mr. Weiler?

A. Yes, sir, I was present.

Q. Then, you knew and you were there, as a matter of fact, you were present when Mr. Oates, who was the office manager, prepared that paper, and you saw Mr. Weiler sign it?

A. Correct.

Q. And while you say it was not important to get a signature to show who received these tires, it was important eight days later to get a letter signed by the man who had purchased them and paid for them, according to you?

A. That is right.

Q. You never handed Mr. Weiler a bill for these tires, did you?

A. I don't remember whether I did or not.

Q. As a matter of fact, you don't know if your company sent a bill to Mr. Weiler for these tires, do you?

A. No, I don't.

Q. Don't they usually send statements when they make a sale? Don't they usually send them to the purchaser?

A. If you owe them money they will send you a statement.

Q. When they pay cash, they don't?

A. No.

Q. By the way, do you happen to know who actually signed that paper "Bob Hastings"?

A. No, I don't.

Q. It wasn't signed in front of you, was it?

A. No. Weiler would know.

Q. Pardon me; I am asking you if you know.

A. No, I don't know.

Q. As a matter of fact, Mr. Sweeney, this name Bob Hastings that appears upon this paper marked G-3 by the Government, did you see that signed by Dan Roche in his office?

Mr. Curtin: If your Honor please, I suggest, so that the record will be clear, that at this time I offer the paper in evidence, because it has only been identified by the Government and it hasn't been offered yet. My friend, as a matter of law, really has no right even to have this paper passed, when it was not even identified by any witness yet. I put two witnesses on as a matter of procedure, if your Honor please. Neither one of them had seen the paper before. I didn't know this witness had seen it and didn't even ask him. I submit that a paper that has not been offered in evidence, that has only been marked for identification, cannot be used by the defendant.

The Court: It is clearly admissible because this witness testifies that Mr. Weiler, the defendant, gave it to him in his own garage.

Mr. Curtin: I will offer it later.

By Mr. Zion:

Q. I now ask you, Mr. Sweeney, as a matter of fact, isn't it true that Mr. Roche signed that name to this piece of paper in his own office in your presence?

A. No, sir, that is not true.

Q. As a matter of fact, isn't this Mr. Roche's handwriting?

A. I don't know Mr. Roche's handwriting.

Q. You said he was a very good friend of yours.

A. That doesn't make any difference. I am not a handwriting expert.

Q. Mr. Sweeney, how long after the transaction of

March 16, 1942, was your employment with United Petroleum Company terminated?

A. April 1 I was through.

Q. Approximately two or three weeks?

A. That is right.

Q. Mr. Sweeney, you testified that in an effort to make some more money for your company, the United Petroleum Corporation, you solicited the sale of these tires of Mr. Weiler because you could make more money that way than if you returned them to the pool; is that correct?

A. That is correct.

Q. As a matter of fact, if you wanted to return them to the Firestone Tire and Rubber Company, you could have returned them to that company, too?

A. That was the procedure to return them to the Government pool.

Q. In dollars and cents, what would you receive per tire for a 600-16 Standard Convoy tire?

A. We wouldn't receive any money for any specific tire. We would get five per cent of the wholesale price, of the price we paid for those tires, as a handling charge.

Q. What was the wholesale price that was paid at that time for 600 by 16 Standard Convoy tires?

A. I never memorized prices in my twenty years in the tire business. I don't know without a price list.

Q. Mr. Sweeney, did you receive a commission besides salary from your employer for every sale you made?

A. No, sir.

Q. Only straight salary?

A. Straight salary.

Q. And that was the fact on March 16, 1942?

A. That is correct.

Q. By the way, when you solicited this purchase from Mr. Weiler, what price did you give him for these tires? What price did you quote?

A. I don't remember.

Q. Did you quote a price of $7.37 for the 600 by 16 Standard Convoy tires?

A. I am truthfully telling you I don't remember. After all, I am a toolmaker and have been since I got away from United.

Q. You were the manager of United?

A. That is right, but I can't remember those transactions any more than these other witnesses could remember that those papers were in their files.

Q. How long had you been in the automobile tire business before April 1, 1942?

A. About twenty years.

Q. And being out of it all of a year and some six months you are now unable to tell we what the wholesale price was on those sized tires which appear on that bill on that day?

A. That is true.

Q. Mr. Sweeney, going back to the delivery of these tires, didn't it strike you as unusual that Mr. Roche should be on the truck coming for the delivery with Mr. Evans?

> Mr. Curtin: If your Honor please, the witness said twice he doesn't know whether Mr. Roche was on the truck.

> Mr. Zion: He finally said he was. He finally admitted he was there.

> The Witness: I did not.

By Mr. Zion:

Q. But he was present when they were delivered?

A. I don't say that he was. He might have been present.

Q. You said that he was. I think the notes of testimoney will show that you did.

> The Court: I don't think so. He said that he didn't remember.

Mr. Zion: First he said, "I don't remember." Finally he said, "I believe he was there."

The Court: He may testify again on it if there is any question on it.

By Mr. Zion:

Q. Mr. Sweeney, as a matter of fact, Mr. Roche was present when those tires were delivered?
A. I do not remember.

Mr. Zion: Now, you don't remember. That is all, Mr. Sweeney.

Re-direct-examination.

By Mr. Curtin:

Q. Just one or two questions: My friend asked you one question and dropped it rather quickly—

Mr. Zion: I object to that form of question. It is certainly very unfair.

The Court: The preliminary statement may go out.

By Mr. Curtin:

Q. Was there any connection between your subsequent job and this job?
A. None whatever. The tire department was discontinued. When the war is over, I will probably go back there and again be in charge of the tire department.
Q. You went down to the Navy Yard—

Mr. Zion: I object to this type of examination; it is certainly not proper.

The Court: You opened it up by asking him how long after the time. That has a suggestion to it.

The Witness: I would like to answer it.

Mr. Curtin: That is the reason, if your Honor please. If there is any inference between the two jobs—

Mr. Zion: I didn't intend to make any such inference at the time, sir. I object to this line of examination.

The Court: It might have that sort of inference, so I am permitting him to re-examine him on the proposition.

Mr. Zion: Note my objection, sir, and you overrule the objection?

The Court: Yes.

By **Mr. Curtin**:

Q. What position did you take up after you left the United Petroleum Corporation?

Mr. Zion: I object to that question, sir.

The Court: We won't go into it in detail.

Mr. Curtin: I just want to ask one or two questions.

The Witness: I will be very brief. I went back to the job that I left to go overseas in the first World War.

Mr. Zion: I certainly object to that, sir.

The Witness: I went back to the Penn Instrument Company as a toolmaker. I worked there six or eight months, and then I went from there to the Navy Yard as a first-class toolmaker, where I am now employed. I am a toolmaker by trade, although I hadn't worked at it for over twenty years. I went back to it because there was a war.

Mr. Zion: I ask that that be stricken from the record, and I ask for the withdrawal of a juror because of that statement.

The Court: The motion is denied. You opened the door yourself by asking him how long after he left this company he took another job.

Mr. Zion: Very well, sir.

By Mr. Curtin:

Q. With respect to the exhibit my friend was asking you about, I believe you testified that you received this particular exhibit No. 3 from Mr. Lee Weiler, the defendant, himself; is that correct?
A. That is part of his custom of having somebody else's name on there.

Mr. Zion: I move, sir, that that be stricken from the record.

The Court: That may go out.

By Mr. Curtin:

Q. Confine yourself to this particular exhibit, please.
A. I received this from Lee Weiler.

Mr. Curtin: I ask, in view of all the testimony about it, that it be received in evidence.

Mr. Zion: I have no objection to that being put in evidence.

(Letter dated March 16, 1942, on letterhead of Brewerytown Garage, signed "Bob Hastings" addressed to United Petroleum Corporation, was received in evidence as Government's Exhibit 3.)

By Mr. Curtin:

Q. With respect to the Brewerytown Garage, 31st and

Thompson Streets, Philadelphia, were you acquainted with who were the owners or proprietors of that garage?

A. I understood that Weiler was the owner of that garage, was the proprietor of the garage.

Q. Did you know any Bob Hastings up there at all? That is what I am trying to ask you, sir.

A. I don't think I knew the man. There was a man around there by that name.

Q. There was a man but you don't know him. That is all.

Mr. Zion: I move that that question and answer be stricken out, what might have been.

Mr. Curtin: I will agree to it.

Daniel L. Roatche, having been duly sworn, was examined and testified as follows:

Direct-examination.

By Mr. Curtin:

Q. Where is your place of business?

A. At the present time I am employed by the Lee Tire and Rubber Company in Conshohocken.

Q. In March, 1942, did you have a place of business?

A. I operated as Dan The Tire Man at 815 North Broad Street, Philadelphia.

Q. I show you Government's Exhibit No. 5 relating to purported sale of 150 600-16's and 20 625-650-16's. I ask you to look at this exhibit, please. Did you purchase those tires yourself?

A. I did not.

Q. Did you have anything to do with the purchase of those tires?

A. Nothing to do with the purchase of them.

Q. Did you lend any money to anybody to purchase those tires?

A. Never. I had none to lend.

Q. Did you receive any money from anybody to purchase those tires?

A. I did not.

Q. Were those tires ever delivered to you?

A. They were not.

Q. Were they ever sold by you?

A. No, sir.

Q. As a matter of fact, did you have anything at all to do with that transaction?

A. Yes, I had some things to do.

Q. Will you tell his Honor and the members of the jury what you had to do with it.

A. Yes. The date I have forgotten—I would have no reason to remember—but it was probably around the date that has been mentioned. Mr. Sweeney came to me and said that he had been authorized to sell some tires by his company, who were liquidating their tire department, providing they could find a legal outlet. Who was a legal outlet, I wasn't in any position to say. However, I did suggest that perhaps Mr. Weiler would be interested in buying them, and knowing Mr. Weiler much better than Mr. Sweeney, the two of us went out there and there negotions were made for the purchase of the tires.

Shall I continue?

Q. Surely Tell anything you know about it.

A. The tires and I was on the truck that went to Paulsboro. It was operated by Evans, and I went along. The tires were delivered and were brought back to Philadelphia. That particular night, I remember, it was raining quite hard, and my business was at Broad and Parrish, a square and a half above Broad and Fairmount, and I alighted from the truck at that corner and went to my place of business, and that is all that I know about the transaction. Anything else that I might say would be purely hearsay.

Q. As far as this particular transaction is concerned, you were present when the negotiations for the sale were made with the defendant by Sweeney? You were present when the delivery was made to Mr. Evans?

A. That is right.

Q. But you at no time purchased these tires or had anything to do with them yourself?

A. I did not.

Q. You never received any money, $2,750 or $1,500?

A. Nor $27, no, at any time.

Mr. Curtin: You may cross examine.

Cross-examination.

By Mr. Zion:

Q. Mr. Roatche, you were a tire dealer in March of 1942? You sold tires?

A. In 1942?

Q. Yes, 1942.

A. Yes, that is right.

Q. You went with Mr. Sweeney to Mr. Weiler's place of business when the negotiations were had?

A. That is right.

Q. You were not working for United Petroleum Corporation at the time, were you?

A. Never at any time.

Q. You went with Mr. Evans to call for the tires in a truck at Paulsboro, New Jersey?

A. That is right.

Q. At that time you were not working for Mr. Weiler either, were you?

A. No.

Q. You were not working for the United Petroleum on that day either?

A. That is right.

Q. What was your interest in these tires, Mr. Roatche?

A. No interest except at that particular time there was very little business being done. Restrictions were on practically everything, and most of us at that time were just marking time wondering what the next play might be. I was friendly with Sweeney, had been for a number of years, was friendly with both Weiler and Evans, and having nothing else to do, I went along.

Q. Did you see Mr. Evans hand any money over to Mr. Sweeney for the tires?

A. I did not.

Q. You were there at the time the tires were delivered?

A. That is right.

Q. And you came on the truck and went back on the truck?

A. That is right.

Q. You were present when the negotiations were had, you said, between Mr. Sweeney and Mr. Weiler for those tires. What price did Mr. Sweeney ask for those tires; do you know?

A. I would have no reason for remembering that. It was strictly a deal between them.

Q. How much money was handed over to Mr. Sweeney by Mr. Evans?

A. I saw no money change hands.

Q. You were there all the time?

A. It was a very large warehouse, and I was on the truck and did pile the tires in the truck. That was the physical part that I took.

Q. Mr. Roatche, I show you Government's Exhibit No. 3 and ask you if you ever saw that before.

A. I never did.

Q. Did you sign that name Bob Hastings to that piece of paper, Mr. Roatche?

A. Not to my knowledge.

Q. You would know, wouldn't you?

A. I would, that is right.

Q. Mr. Roatche, I am handing you a piece of paper. Here is a pencil. Will you be kind enough to write some words for me and try to write in your own way.

A. Go ahead.

Q. You write "George Washington."

(The witness complied.)

Q. And will you write "Harrisburg."

(The witness complied.)

Q. Will you write "Bob Evans."

(The witness complied.)

Q. Will you write "Baltimore."

(The witness complied.)

Q. Will you write "Hastily yours."

(The witness complied.)

Q. Write the same thing with a capital "H".

(The witness complied.)

Q. Will you write "Hastings."

(The witness complied.)

Q. Will you write "Bob Hastings."

(The witness complied.)

Q. Now write "Bob Evans."

(The witness complied.)

Mr. Zion: May I have that paper? (Addressing the reporter) Will you please mark it for identification Defendant's Exhibit No. 1.

(Yellow paper showing handwriting of Daniel L. Roatche was marked Defendant's Exhibit 1 for identification.)

By Mr. Zion:

Q. Mr. Roatche, did you write this name Bob Hastings on this paper G-3?

A. I have no recollection of signing that name. I would have no reason to.

Q. You had no interest whatever in the purchase of these tires about which we have had testimony?

A. None whatever, only as a personal matter.

Q. You went to the Brewerytown Garage, you rode on the truck that called for the tires at Paulsboro, and you rode back with the truck to Broad and Fairmount Avenue?

A. That is correct.

Q. Mr. Roatche, did you ever acquire any of the tires that were covered or that had been delivered at Paulsboro, New Jersey, on March 16, 1942, those tires about which Mr. Sweeney testified?

A. Not to my knowledge. I may have acquired some of them in this manner, if you will permit me to go ahead.

Q. Go ahead.

A. I did buy tires from Mr. Weiler. The OPA already have and have had that information. Whether or not they were those particular tires or not I would have no way of knowing.

Q. Did you ever receive any of the tires covered in the order which is described in Government's Exhibit G-5?

A. I think I just answered that question.

Q. I ask you again, Did you receive any of those tires?

A. No.

Q. Did you resell any of those tires to anyone?

A. I couldn't identify any of those tires that I might have sold, as those particular tires.

Q. Did you share with anyone in the proceeds of the sales of any part of them?

A. Not directly or indirectly.

Q. Mr. Roatche, I am going to ask you to do a little more writing for me, if you will. Will you write "Bob Hastings."

(The witness complied.)

The Court: He has already written that.

Mr. Zion: I want to show it again, sir.

By Mr. Zion:

Q. Will you write Capital "B" "Bobcat."

(The witness complied.)

Q. Will you write "Tidings."

(The witness complied.)

Q. Will you write "Rings."

(The witness complied.)

Q. Will you write "Haddonfield."

(The witness complied.)

Q. Write your own signature, please.

(The witness complied.)

Mr. Zion: Will you mark that D-2 for identification, please?

(Yellow paper showing handwriting of Dan Roatche was marked Defendant's Exhibit 2 for identification.)

By Mr. Zion:

Q. I ask if at any time, Mr. Roatche, you didn't sign that name Bob Hastings.
A. I have no recollection.

Mr. Curtin: I think we have gone far enough.

The Court: The objection is sustained. How many times do you want to ask him?

Mr. Zion: After he has written his name. I want the jury to ask how many times. They will see the signature and the Court will see the signature.

Mr. Curtin: If your Honor please, there is a proper time for my friend to try his case.

Mr. Zion: Mr. Curtin—

The Court: Be calm, gentlemen. Let us have no arguments at this time. We will have time to do that later.

Is that all with this witness?

Mr. Zion: Yes.

The Court: That is all.

Mr. Curtin: The Government rests.

THE GOVERNMENT RESTED.

Mr. Zion: If the Court please, I move now for a directed verdict and would like to argue before the Court, not in the presence of the jury. I see it is now 4:10 anyhow, sir.

The Court: Ladies and gentlemen of the jury, you may be excused until tomorrow morning at ten o'clock. During the recess you will refrain from discussing this case among yourselves, as much as possible, so that you will not make up your minds until all the evidence is before you; and, particularly, refrain from allowing anybody to talk to you about it. We will adjourn until tomorrow morning at ten o'clock.

(The jury was thereupon excused.)

ARGUMENT.

Mr. Zion: With the permission of the Court, the indictment charges perjury in that certain statements were made of material facts at a previous hearing, those statements being that he had not purchased certain tires, that he had not received these tires, and that he had lent the moneys to Roatche or Sweeney, either or both.

The proofs in this case offered by the Government show only that a purchase was made by way of an order or letter acknowledging a purchase of these particular tires. There is not one word of evidence that he actually received these tires. There is evidence that tires were delivered to a man named Evans on a truck in Paulsboro, New Jersey. No one states for the Government that those tires were received by Mr. Weiler.

The Government put in evidence the transcribed notes. In that testimony Mr. Weiler states he did purchase those tires, but he explains, "I don't consider it a purchase, however, because I didn't actually receive them." Therefore, we have evidence in this case that he purchased them, evidence also that he has testified in a prior trial that he purchased them; therefore, there can be no false oath there. I will go into the question of materiality later, but on that point alone there is absolutely no evidence of a false statement.

The Court: He said in the transcript there that he didn't purchase them.

Mr. Zion: In one place he said he didn't, but then he explained, "Yes, I purchased them; I bought them, but not for myself."

The Court: When he was pinned down to the proposition he said he never purchased them and never paid for them.

Mr. Zion: No, sir; the testimony is just the opposite. I will read it to you from this testimony.

The Court: You don't need to to read it; I have got it right here.

Mr. Zion: You are reading parts only from the indictment, but I mean from the exhibit here, sir, the exhibit put in by the Government as being the transcribed notes, all of which was put in.

The Court: That is true, but when he was pinned down here he said—

Mr. Zion: As a matter of fact, if you go in chronological order, the first part is when he said that; then he started explaining that. The notes here show it. You may pick out in the indictment certain ones you allege to be false, but the proof as introduced by the Government is before you, sir, that he testified, "I didn't consider it a buy because I didn't actually receive it. My notion is this: I lent the money for it. I furnished the money for the transactions."

The Court: Well, he testified to that, and now this man says that he never loaned him any money.

Mr. Zion: I am going to that point a little later, sir. The testimony introduced by the Government is that he said, "Yes, I purchased them but not for myself." He said, "Well, my notion is you don't buy them unless you receive them. I put up the money. I was to get it back and I got it back from Roatch." Therefore, no matter what this indictment says—

The Court: I am reading from this quote. I followed it when I heard the testimony.

Mr. Zion: That is right, as far it goes, but the rest of the testimony is in also.

The Court: Well, it calls for an explanation, anyway.

/ **Mr. Zion**: Yes, sir, and in the other case he gave that explanation. He said, "I don't consider myself a buyer for them. I purchased them for somebody else's benefit." That is what it boils down to, and that is the testimony here. You can take excerpts—

The Court: I am not talking about excerpts, but when he was pinned down and asked, "Did you buy these tires or didn't you?" he said "No, I didn't buy them." Then he says, "I loaned my money to buy them," and this man says that he didn't loan any money.

Mr. Zion: First he said, "May I explain what I consider buying?" Then he said, "I did buy but not for myself."

The Court: Well, let him explain further. The motion is overruled.

Mr. Curtin: I would like to answer. My friend filed a motion to quash, which was heard at great length before Judge Ganey, in the last part of which he brought before Judge Ganey the same thing he is doing now. Judge Ganey considered it de novo.

The Court: Yes. We will not waste any time now.

Mr. Curtin: It is wasting time.

Mr. Zion: You deny my motion, sir?

The Court: Yes, sir.

The court will adjourn until tomorrow morning at ten o'clock.

(Adjourned at 4:17½ P. M. until Wednesday, September 29, 1943, at ten o'clock A. M.)

Philadelphia, Pa., September 29, 1943.

Before Hon. T. Blake Kennedy, *J.*, and a Jury.

Present:

Thomas J. Curtin, Esq., Assistant United States Attorney, for the Government;

Peter P. Zion, Esq., for the Defendant.

The Court: Proceed.

(Mr. Zion opened to the jury.)

Mr. Curtin: If your Honor please, I did not want to interrupt counsel, but so that the jury will not start out on a false premise, sir, I wish and desire you to instruct them that the question of materiality is one for the court to determine, not one for the jury, and I submit, sir, the case of Sinclair vs. The United States—materiality of false testimony as an element of perjury is a question for the trial court to determine.

Mr. Zion: There is no dispute about that.

Mr. Curtin: I do not want the jury to start out on the basis that they must determine the materiality.

DEFENDANT'S EVIDENCE.

MR. ZION: Mr. Schwartz.

H. A. B. SCHWARTZ, recalled:

Direct-examination.

By MR. ZION:

Q. Mr. Schwartz, of course, you have already been sworn, and you are the stenographer who took the notes of testimony in the original trial against Weiler and Evans, is that correct?

A. Yes, sir.

Q. Mr. Schwartz, at my request, have you read over the notes of testimony taken by you as presented by the Government?

A. Yes, sir.

Q. As a result of that reading of this record are you able to state whether or not there is any evidence presented by the Government showing any transaction had after January 20, 1942?

MR. CURTIN: Objected to.

MR. ZION: If the Court please, if you will recall, sir, yesterday, you said to me that that would be part of my defense, I should put it in in my own defense, and I have held Mr. Schwartz for that purpose.

THE COURT: Overruled. You may answer.

MR. CURTIN: If your Honor please, I do not mind him offering any evidence, but I do not think, sir, he should be able to say what is in the entire record.

The Court: On cross-examination you may ask where he got that information.

Mr. Zion: Yes.

The Court: Read the question.

(Last question read by the reporter as follows:

"As a result of that reading of this record are you able to state whether or not there is any evidence presented by the Government showing any transaction had after January 20, 1942"?)

The Witness: Yes, I have read the testimony and am able to state.

By Mr Zion:

Q. Is there any? Was any evidence presented by the Government in this case of any transaction after January 20, 1942?
A. No, sir, none.

Mr Zion: Cross-examine.

Mr. Curtin: I have no questions.

Mr. Zion: That is all, Mr. Schwartz.

Mr. Zion: If the Court please, I wish to offer in evidence the exhibits which were identified yesterday marked 1 and 2, being specimens of handwriting by the witness Roatche, taken on the stand. I wish to hand these to the jury and ask them to look at them at their leisure.

(Paper containing specimens of handwriting of witness Roatche, previously marked Defendant's Exhibit 1 for identification was marked in evidence.)

(Paper containing specimens of handwriting of witness Roatche, previously marked Defendant's Exhibit 2 for identification was marked in evidence.)

Mr. Zion: And to compare the handwriting of "Bob Hastings" that appears there. You will see the differences in those two made here. Particularly with the "Hastings" and "gs", and compare those "H's" and see whether or not there is a similarity in that handwriting. Also compare Mr. Weiler's handwriting.

Mr. Curtin: If your Honor please, as a matter of orderly procedure, I do not think counsel is supposed to close his case here.

Mr. Zion: Mr. Curtin asked the privilege of showing papers yesterday to the jury.

The Court: That is argument.

Mr. Zion: All right.

Mr. Weiler.

Lee F. Weiler, having been duly sworn, was examined and testified as follows:

Direct-examination.

By Mr. Zion:

Q. Mr. Weiler, where do you live?
A. 1937 67th Avenue.
Q. Philadelphia?
A. Philadelphia.
Q. What is your present business?
A. I work at Edward G. Budd.
Q. In Philadelphia?
A. That is right.

Q. And, Mr. Weiler, you are the defendant in this particular cause of action?

A. Yes, sir, that is right.

Q. And you were one of the defendants in the cause of action of the United States of America vs. Lee F. Weiler and Ellwood T. Evans tried last March, 1943, in this district?

A. That is right.

Q. At which time you were acquitted?

A. That is right.

Mr. Zion: I understand the jury has trouble with my voice, so will you please keep your voice up also.

The Court: It is all right.

By Mr. Zion:

Q. Mr. Weiler, in bringing your mind down to March of 1942, what was your business then?

A. I had a garage and wholesale automobile tires and supplies.

Q. Mr. Weiler, bringing your mind—by the way, in March of 1942, were you very active in the operation of your garage business?

A. No, I was not.

Q. What were you doing as far as your business was concerned in March of 1942?

A. I had the building for sale and was liquidating.

Q. You had run a public garage as well as a tire business?

A. That is right.

Q. At that time what was your position in the tire business? In other words, were you a dealer, retailer, wholesaler, or what?

A. Retail and wholesale.

Q. And were you also a distributor?

A. That is right.

Q. What type of tires had you been handling from time to time? In other words, had you ever handled Firestone tires?

A. I was a Firestone distributor.

Q. Did you know Mr. Sweeney in March of 1942?

A. Yes, sir.

Q. Did you know what position he held then?

A. Yes, he was manager of the United Petroleum Company Tire Department.

Q. Had you ever done business with that company before March, 1942?

A. Yes, I sold them tires.

Q. Did you know Dan Roatche, the witness that was on the stand here yesterday?

A. Yes, sir.

Q. How long had you known him?

A. About eight or ten years.

Q. Did you know him very well?

A. Yes, sir.

Q. Did you know what business he was in in March of 1942?

A. He was in the tire business.

Q. Now, Mr. Weiler, you heard Mr. Sweeney testify as to a certain transaction that took place about March 16, 1942, and on March 24, 1942. I want you to tell this court and jury just what happened at that time in March as far as this so-called transaction was concerned, what took place?

A. Well, Mr. Roatche and Mr. Sweeney called up my office, and it wasn't the first time Roatche was there, but it was the first time Sweeney ever came to sell me any tires, and he told me that they had around 2,000 tires that the company was going to send back to the pool, they were going out of the tire business. They asked me whether I was interested in buying them, and I asked him what they wanted for them. He said the cost—I don't remember the exact figures, it was around four and a half to five dollars. He said he wanted $14 for 600x16, and $20 for 625-650x16.

Q. What was the price at which you got them from your sources at that time?

A. Convoy and Regular tires would cost me less than $6.

Q. They asked you fourteen to twenty?

A. Yes, sir.

Q. Then what happened

A. I told them I wasn't interested. That was roughly about, I would say, March 10, in about that time, so they went away and a couple of days later they came back again.

Q. Both Mr. Roatche and Mr. Sweeney?

A. That is right, Mr. Roatche and Mr. Sweeney. And they asked me whether I was still interested in them, and I told them no, and, well, Sweeney told me that his job was finished, that they were going out of the tire business; he had been with them about 20 years and he didn't know what he was going to do, and he had a chance to make some money on them if he could get them, and wanted to know whether I was interested, and I told him no, and so he asked me whether I knew anybody that was interested. I said not at those prices.

He said, "Well, I could get more for them if I had the money to buy them."

So I had a conversation—Mr. Evans was there—and I agreed to lend them money. Mr. Roatche and Mr. Sweeney was both there.

Q. Who was it that asked you to lend the money to them?

A. Both of them asked me to lend the money. I only know Mr. Roatche. I had done business with Roatche, and he had an account with us.

Q. Did they tell you how much money they needed?

A. Roughly about $3,000.

Q. Did you agree to lend them money?

A. Yes, sir.

Q. Did they ask permission for them to buy them in your name at that time?

A. Yes, sir.

Q. Did you get the money for them?

A. Yes, sir.

Q. Where did you get the money?

A. The Broad Street Trust Company.

Q. When did you get it?

A. March 16.

Q. How did you get the money from Broad Street Trust?

A. I borrowed it.

Q. You borrowed $3,000 from them?

A. Yes, sir.

Q. After you borrowed the money from them what did you do with that money?

A. I left it with Mr. Evans. He was running the garage for me.

Q. Did you leave $3,000 or less?

A. I left $3,000 with Mr. Evans because they didn't know how many tires they were going to get or how much it would cost.

Q. After you left that money with Mr. Evans did you hear any more about that money, or did you get it back?

A. It was either two or three days the longest I got that money back.

Q. Who turned the money back to you?

A. Mr. Evans.

Q. Do you know where he got the money?

A. Yes, he had lent it to Mr. Roatche and also got it back from Mr. Roatche, I believe.

Q. Did you ever see any of these tires in this transaction?

A. No, I did not.

Q. I show you Government's Exhibit marked G-5 reported to be a bill of the United Petroleum Corporation, and ask you whether anyone at any time, either by mail, directly, or otherwise, of the United Petroleum Corporation, or anybody else, ever presented you with the original of that bill or any part of that bill?

A. No, they did not.

Q. When was the first time you ever saw this bill, or a copy of it, or any part?

A. The last trial it was present, and I never saw it before. I saw it at that time.

Q. That was March 24, 1943, if I remember rightly?

A. That is right.

Q. Now, Mr. Weiler, you said about two or three days after you had advanced this money it was paid back to you, that is correct?

A. That is right.

Q. What did you hear about this next?

A. It was about a week later, Mr. Sweeney came to the garage and asked whether I would be good enough to go out and see his boss, that he wanted to see me about the purchase of these tires.

I asked him what he wanted of me.

He said he wanted to be sure whether I had bought the tires. He said he was in the middle.

I said there was no reason I should go out.

He said, "I am in the middle." and he said, "I gave him a piece of paper and told him you bought the tires." He was desperate and threatened to commit suicide if I wouldn't go along.

I went out there to Wynnefield—I don't know the exact address—and I saw this Gabel, the manager of the company.

Q. What was said out there?

A. He asked me whether I bought the tires, and I told him I had.

He said "Would you give me that in writing?"

I said "All right."

He said "Well, I want it on your stationery." So he sent his bookkeeper, who is also, I believe, a Notary Public, back to my garage.

Q. Who else went back to the garage?

A. Mr. Sweeney and the bookkeeper.

Q. What happened there?

A. I gave him stationery, but I hadn't no typewriter. He wanted it typewritten, so they went out and had it typewritten, that I had purchased these tires.

Q. Now, I show you Government's Exhibit marked G-4, that is the one of this letter. Did you sign this paper then in your garage?

A. Yes, sir.

Q. On this paper appears a seal of Notary Public. Did you ever take an oath to that paper?

A. I did not.

Q. That seal was affixed after you signed it, is that correct?

A. That is right.

Q. Did you ever see that paper again after March 21, I think, 1942, is the date of that, until the time of the trial you had in the other case?

A. I did not.

Q. Up to that time, that letter sets forth a number of tires, did you know even how many tires were in the so-called deal?

A. No, I never saw them. I didn't know how many.

Q. Did you ever see any of those tires, Mr. Weiler?

A. No, I did not.

Q. Now, Mr. Weiler, after you signed this paper for Mr. Sweeney and for Mr. Gabel, or while you were in your place of business, did Mr. Sweeney say anything further to you about that paper?

A. I did not get that.

Q. After you signed this particular paper marked Government's Exhibit G-4, that is the statement that you had purchased these tires, and you were in a position to—you had a right to buy them—did Mr. Sweeney say anything further to you about that paper?

A. Yes, he said it would be put in the files of the company and it wouldn't be used only unless the OPA checked it.

Q. Mr. Weiler, on that date, you were capable and legally had the right to buy tires, that is correct, isn't it?

A. That is correct.

Q. Mr. Weiler, I show you Government's Exhibit marked G-3, that has the Hastings' signature on that letter, that piece of stationery, were you using that stationery on March 16, 1942?

A. I was not.

Q. Which stationery were you using at that time?

A. Using my own name.

Q. That is the one that they have, which you signed, on which the sale appears, Government's Exhibit 4?

A. Yes, sir.

Q. Did you ever give anyone that piece of stationery on which the name Bob Hastings appears?

A. No, I did not.

Q. On March 16, 1942, did you have anyone named Bob Hastings working for you?

A. No.

Q. Did you have anyone named that?

A. No.

Q. Did you authorize anybody to sign that paper which appears as an order to buy tires signed by "Bob Hastings"?

A. No.

Q. Who in March of 1942 would have the right to sign an order to buy tires for you?

A. Only Mr. Evans and myself.

By The Court:

Q. Was Mr. Evans a partner of yours?

A. No, he was manager of the garage for me.

Q. He was an employee of yours?

A. That is right.

By Mr. Zion:

Q. Mr. Weiler, this paper marked G-3, the Hastings' paper, when was the first time you saw that paper?

A. At the last trial.

Q. That was March of 1943?

A. That is right.

Q. Had you ever seen it at any time before then?

A. No, sir.

Q. Prior to the time that you were indicted in this last trial, in which you were found not guilty, had you ever been arrested in your life?

A. No.

Q. Had you been in any difficulty in your life at any time?

A. No, sir.

Q. By the way, you are married and have a family?

A. I have four boys.

Q. And you support your wife and children, they live with you?

A. That is right.

Q. How long have you lived in the neighborhood where you are living now?

A. With the exception of one year, 15 years. I moved out and came back in one year.

Q. Have you lived in Philadelphia all your life?

A. Born and raised in Philadelphia, never left the city.

Q. How old are you, Mr. Weiler?

A. 41.

Q. Did you knowingly make any false statement under oath in your last trial, Mr. Weiler?

A. I did not.

Mr. Zion: Cross-examine.

Cross-examination.

By Mr. Curtin:

Q. You sold your garage in January, 1943, did you not?

A. That is right.

Q. You were Chairman of a Rationing Board here in Philadelphia, were you not?

A. That is right.

Q. You were acquainted with the requirements of rationing certificates, freeze orders, and things relating to tires, were you not?

A. At that particular time I don't think anybody was.

Q. I ask you to answer the question, and then you can explain all you want. Were you familiar, as Chairman of a Rationing Board?

A. I was, as to what rules and regulations were in effect at that time, yes.

Q. Now, this particular deal, or whatever you care to call it, you never told the OPA about that deal, did you?

A. I did not.

Q. As a matter of fact, did you ever file a P.D.-216?

A. They came to me on January—

Q. I want you to answer me.

A. I did not, no.

Q. Then you may explain if you care to.

A. All right.

Q. Did you ever file any?

A. I did not.

Q. As a matter of fact, the P.D.-216 is required for any transaction, is it not, in tires?

A. I couldn't tell.

Mr. Zion: I object to that. It has certainly nothing to do with the last trial.

The Court: Overruled.

The Witness: I couldn't answer that. I never saw the P.D.-216 form. The Rationing Boards had nothing to do with that when I was there.

By Mr. Curtin:

Q. With respect to this purchase of tires, you say now that you gave the money to whom?

A. Mr. Evans.

Q. How much did you give him?

A. $3,000.

Q. When did you get it back?

A. Either two or three days afterwards.

Q. Two or three days afterwards?

A. That is right.

Q. You are positive of the $3,000, aren't you?

A. That is right.

Q. If this purchase only involved 170 ties for $1248.73, why would you give him $3,000?

A. I didn't know how much they were buying, and the tires supposedly were $15 to $20 when they wanted to sell them to me. What he was getting I didn't know. This was the first time I saw this bill, the last case.

Q. You know the difference between a $1248 purchase of tires and $3,000?

A. I didn't know how many tires they were buying.

Q. You were in the tire business how long?

A. 12 years.

Q. But you gave $3,000 to Mr. Evans and you got it back two or three days later?

A. That is right. The amount of tires I never knew until I saw this bill. I never saw this bill until the last trial. It was never sent to me.

Q. All right, keep talking, anything you want to explain, go ahead. I do not want to stop you.

A. All right.

Q. Now, with respect to the Notary Public that put the seal on there, did he ask you to subscribe to the facts even if he didn't have a Bible?

A. He did not.

Q. He did not ask you to raise your right hand?

A. No.

Q. He just put the seal on there without—

A. That is right.

Q. With respect to Mr. Sweeney, you said something about that he was going to commit suicide unless you came out there, is that correct?

A. That is right.

Q. And you went out there and you signed your name to that so-called order blank, is that correct?

A. Not at that time, no.

Q. No, I mean the time the affidavit was put on there?

A. Yes, I signed that.

Q. And you stated in that that you were the purchaser, did you not?

A. That is right.

Q. Now, you were in court when your manager Evans gave a sample of his handwriting the last time, were you not, too?

A. Sure.

Q. I show you what I will have tentatively identified as Government's Exhibit No. 6, which was G-10 in the last trial and ask you if you saw Mr. Evans give samples of handwriting at the last trial?

A. I never saw this paper, but I know he gave samples of his handwriting.

(Paper containing specimen of handwriting of Ellwood T. Evans was marked Government's Exhibit 6 for identification.)

Mr. Curtin: I will identify it.

Mr. Zion: We will admit that.

Mr. Curtin: This is admitted, if your Honor please, as a standard that was taken of the co-defendant Evans at the last trial in this case.

I ask permission to offer it in evidence, and hand it to the jury.

Mr. Zion: Why do you not present your case properly?

Mr. Curtin: That is correct.

By Mr. Curtin:

Q. When Mr. Sweeney told you he was going to commit suicide you went out there and you ultimately gave him this second letter, with the Notary Public—

A. That is right.

Q. What about Roatche? What about him, did you ever give him any money or anything about this deal?

A. No, I never gave either one of them the money.

Q. Now, I ask you to look at Government's Exhibit 4, with the affidavit on, again. That calls for 170 tires, does it not?

A. That is right.

Q. So that you did know how many tires were going to be purchased in this deal?

A. No, this came after the tires were purchased. This is a week afterward.

Q. You mean that the first time you knew there were 170 tires was a week afterward?

A. That is right, the first time I knew was a week afterwards.

Q. And you had already given him $3,000?

A. That is right. In fact, that was eight days afterward.

Q. Eight days afterward?

A. Yes.

Mr. Curtin: If your Honor please, I would like now to turn to page 21 of Exhibit G-2.

I have an extra copy. Does your Honor want to follow me? It will make it easier.

By Mr. Curtis:

Q. I will start at the top. You testified, did you not, at the last trial of this case:

"Q. Let me ask you again—first of all you didn't get the tires?

A. No, sir.

Q. Dan, The Tire Man, got them?

A. Yes, sir, that is right.

Q. Did Dan, The Tire Man, buy them?

A. I don't know who bought them. Mr. Sweeney bought the tires.

Q. Then the seller bought the tires?

A. Yes, he knew his agent was at the end of this deal.

Q. Then the seller bought the tires?

A. The representative of the seller.

Q. The employee of the seller?

A. Sweeney.

Q. Sweeney was what,—what was his position?

A. Manager.

Q. In other words, the manager of the selling company was the real buyer of the tires?

A. That is right.

Q. And did you loan him the money?

A. No, I loaned it to Mr. Roche.

Q. And who is he?

A. Dan, The Tire Man, the ultimate buyer of the tires."

Did you testify that way last time?

A. That is right.

Q. Then you did lend that money to Mr. Roatche the last time, didn't you?

A. Through Mr. Evans, yes. I didn't give him the money directly, no, sir.

Q. No, you gave the money to Mr. Evans to give to Mr. Roatche?

A. That is right, I always did say so. I never changed it.

Mr. Curtin: I ask your Honor to turn to the middle of page 24, "By the Court", this time. The Court questioning Mr. Weiler.

"Q. You loaned Dan, The Tire Man, the money?

A. I did, that is right.

Q. How did you lend it to him, as cash or by check?

A. I believe it was cash.

Q. Twenty-seven hundred and fifty dollars?

A. I couldn't answer whether it was check or cash.

Q. But the amount of the loan was $2,750.00?

A. Roughly, yes, sir. I can't tell you exact.

Q. Was the $2,750.00 bill of sale the only one you had with—

A. I said "roughly". I didn't see the price.

Q. Then you don't know whether it was Thirteen hundred dollars or twenty-seven hundred dollars?

A. I loaned him the money and—

Q. The bill for the transaction is $1,248.73?

A. I never saw that bill, your Honor."

So that the second time you testified you gave the money to Dan, The Tire Man, didn't you?

A. That is right.

Q. At that time you never told anyone about giving the money to Evans to give to Dan, The Tire Man?

A. I wasn't there.

Q. I am talking about at the last trial.

Mr. Zion: I—

Mr. Curtin: If your Honor please, I do not want any interjections from my friend.

By Mr. Curtin:

Q. Did you testify anything about giving the money to Evans to give to Dan, The Tire Man?

A. No.

Q. Why didn't you say so at that time, instead of stating that you gave the money to Dan, The Tire Man?

A. They didn't ask me.

Q. (Continuing) When the Judge asked you if you gave the money to Dan, The Tire Man?

A. He ultimately got it, yes, sir.

Q. Wouldn't you naturally say you gave it to Mr. Evans to give it to him?

A. When I borrow money at the bank I get it from the teller, not from the president. If you are going to be technical, Evans gave it to him, but I gave Roatche the money.

Q. Evans was a co-defendant with you last time, was he not?

A. Yes, sir.

Q. As a matter of fact, you didn't mention him at all?

A. He was there, why should I?

Q. You said today that you gave the money to Evans to give to Dan, The Tire Man?

A. Yes, sir.

Q. I am asking you, why didn't you so testify at the previous trial?

A. I didn't think it was necessary.

Q. As a matter of fact, you didn't because he was a co-defendant?

A. No, I have nothing to hide. I told the truth. If I hadn't told the truth there would be nothing to the case. I had a right to buy tires. If I said I bought the tires this wouldn't come up at all. I told you the truth.

Q. If you bought these tires you would have to file a P. D.-216 with the OPA?

A. That is right.

Q. It follows necessarily if you did not file a P.D.-216 then you would never get this purchase?

A. I would never have gotten tires.

Q. One of the charges last time was that you did not file a P.D.-216?

A. They had to be filed December 31, 1941. We didn't get them until January 25.

Q. Every month did you have to file them, or every three months?

A. Every three or four months, I believe.

Q. Even if you filed one in December, 1942, if you had transactions in tires after December—January, February or March—you would have to file a second P.D.-216, would you not?

Mr. Zion: I object to that. The indictment does not charge that.

The Court: Overruled.

Read the question.

(Last question read by the reporter:

"Q. Even if you filed one in December, 1942, if you had transactions in tires after December—January, February or March—you would have to file a second P. D. 216, would you not"?)

The Witness: That is right.

By Mr. Curtin:

Q. But you insist that this was not your transaction at all?

A. That is right.

Q. You gave $3,000 to Mr. Evans now, you said, to give to Mr. Roatche?

A. That is right.

Q. And the transaction was only for twelve hundred and some dollars?

A. Yes, I didn't know at that time what it was. I never saw the deal.

Mr. Curtin: That is all.

Re-direct-examination.

Mr. Zion: If the Court please, in fairness to this defendant, I would like the Court to turn to page 40 of the Government's Exhibit G-2, which was the testimony given on the last trial, and I would like to read it.

Mr. Curtin: If your Honor please—

Mr. Zion: This is in evidence.

Mr. Curtin: I make no objection to putting in everything, but I suggest he has a witness on the stand. He should proceed properly.

Mr. Zion: All right.

By Mr. Zion:

Q. I show you Exhibit G-2, introduced in evidence by the Government, and ask you to read, beginning "By the Court", the defendant's, your testimony, in the last trial, having to do with to whom you actually handed the money, and what you said at the last trial. Read aloud.

A. "Q. When you gave this $2,750.00 to Evans and Sweeney, about when was that?

A. The 16th of March, I believe.

Q. The 16th of March,—don't you know?

A. Pardon me,—I didn't give it to Sweeney; I left it with Evans.

Q. And what about the balance, the other $1,500.00?

A. They had a number of tires when they were trying to sell to me; I didn't know the exact number of tires, and that is why I left that amount.

Q. And that is on March 16th?

A. Yes, sir. I never knew how many tires they had until the United came over eight days later and asked me to sign this paper,—which this gentleman (indicating) can testify I did. The United never gave me a bill because I never bought anything from them."

Q. Just read to the bottom of the page, that is all.

So that in the last trial you did testify that you had turned over this money to Evans to give to these men?

A. That is right, I never denied that.

Q. You didn't recall that?

A. That is right.

Mr. Zion: No other questions. That is all.

Mr. Zion: The character witnesses, please. The character witnesses for Mr. Weiler will all come up, please.

The Court: What are you going to do, have them all sworn at the same time?

Mr. Zion: I think so. We might as well.

The Court: No, you cannot do that.

Mr. Zion: All right, I will take them one at a time.

Roscoe D. Farlow, having been duly sworn, was examined and testified as follows:

Direct-examination.

By Mr. Zion:

Q. Mr. Farlow, what is your business?

A. I am with the Edward G. Budd Company.

Q. Do you know Mr. Weiler, the defendant in this case?

A. Yes, sir.

Q. How long have you known him?

A. I have known him six to eight months.

Q. Do you know other people that know him?

A. Yes, I know quite a few.

Q. What is his reputation for honesty, integrity, and truthfulness?

A. Unquestionable.

MR. ZION: That is all.

MR. CURTIN: I have no questions.

I will stipulate, if your Honor please, in the interest of time, that all that are called will testify the same way, if he has not many of them, and he can put their names on the record.

MR. ZION: I would like to put their names in the record. They will all testify that they have known him for 15 or 20 years.

THE COURT: All right.

(The following prospective witnesses approached the bench):

MR. ZION: What is your name?

MR. SCHMUCKER: Raymond W. Schmucker.

MR. ZION: What is your address?

MR. SCHMUCKER: 1312 North 29th Street.

MR. ZION: Come up. We will state of record that all these witnesses will state that he bears a good reputation in the community for honesty, integrity and truthfulness.

MR. ZION: What is your name?

Mr. Berger: Max Berger.

Mr. Zion: And the address?

Mr. Berger: 4723 North Walnut Street.

Mr. Zion: The next man?

Mr. Beggs: Edward J. Beggs.

Mr. Zion: And your address, Mr. Beggs?

Mr. Beggs: 1913 67th Avenue.

Mr. Zion: The next man, please, Mr. Marshall?

Mr. Marshall: Harry W. Marshall.

Mr. Zion: And your address?

Mr. Marshall: 413 East Moreland Road, Willow Grove.

Mr. Zion: The next man?

The Court: Six is enough. We will limit them to six.

Mr. Wenkenbach: H. A. Wenkenbach, 3036 Stiles Street.

Mr. Aaronson: M. Aaronson, 1256 North 64th Street.

The Court: That is enough.

Mr. Zion: That is all. We only want six.
That is the defendant's case, so we rest.

GOVERNMENT'S EVIDENCE IN REBUTTAL.

(Paper containing specimen of handwriting of Ellwood T. Evans previously marked Government's Exhibit 6 for identification was marked in evidence.)

Mr. Curtin: I would like to recall Mr. Sweeney for rebuttal, sir.

The Court: Very well.

Bernard D. Sweeney, recalled.

Direct-examination.

Mr. Curtin: Will you come back a minute, Mr. Sweeney?

You have agreed upon that exhibit, have you not?

Mr. Zion: Oh, yes.

Mr. Curtin: The exhibit stands.

Now, if your Honor please, first I would like to help the jury while I am talking to this gentleman, let them examine my standard that I took from Mr. Evans.

By Mr. Curtin:

Q. Mr. Sweeney, you have been here in court, and you have heard all the testimony, is that correct?

A. Yes, sir.

Q. First, I would like to direct your attention to the statement—did you ever tell anybody you were going to commit suicide?

A. Never in my life have I ever had any occasion to even think about such a thing.

Q. What is your religion?
A. I am a Catholic.

Mr. Curtin: That is all.

Mr. Zion: No questions.

Mr. Curtin: That is all.

Mr. Zion: Anything further?

Mr. Curtin: No.

The Court: The Government rests.

Mr. Zion: If the Court please, I ask leave to renew my motion for a directed verdict for the defendant.

The Court: Overruled.

Mr. Zion: And I hand up the points for charge.

Mr. Curtin: Does your Honor want us to address he jury now?

The Court: Yes.

Mr. Curtin: Thank you, sir.

(Mr. Curtin argued the Government's case to the jury.)

(Mr. Zion argued the defendant's case to the jury.)

(Mr. Curtin argued the Government's case in rebuttal to the jury.)

CHARGE OF THE COURT.

KENNEDY, *J.*

Ladies and gentlemen, this is a case in which perjury is charged through an indictment.

There is a statute which provides:

> "Whoever having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, shall wilfully and contrary to such oath state or subscribe any material matter which he does not believe to be true, is guilty of perjury."

And the statute provides for the punishment in the event of an offense, which, as you know, is within the province of the court, and it is the function of the jury to find the guilt or innocence of the accused.

Perjury, as commonly defined, and I think properly, is the wilful assertion of fact, upon belief or knowledge, made by a witness in a judicial proceeding as part of his evidence, or upon oath or form allowed as substitute for an oath, whether such evidence is given in open court, or in an affidavit, or otherwise, such assertion being known to such witness to be false, and being intended by him to mislead the court, jury, or person holding the proceeding

I think that the necessary elements of the proof of perjury are substantially as follows:

The intention on the part of the witness if he has given false testimony must be wilful.

The sworn to testimony or the oath must be actually false.

The party accused must have been sworn to tell the truth.

The proceeding in which the alleged false testimony is given must be a judicial proceeding.

The assertion so made and alleged to be false must be absolute.

And the oath and alleged false testimony must be material to the question pending.

Some of these elements, I take it, are not in dispute, and I will so charge, whether or not they will be agreed to by the parties in this case.

It is not in dispute that the defendant who is charged in this case did offer testimony in a former trial, and that previous to giving that testimony he was sworn to tell the truth by a competent official of the court. That was the proceeding which took place in this court before Judge Kalodner on March 24, 1943, in which the defendant was being tried, with one other, on the charge of having violated certain provisions of the Act relating to the government of price control and conspiracy. That was a judicial proceeding, and I so charge you, and the matter testified to in that proceeding by the defendant was material to the investigation being made at that time in that trial, which leaves for your determination, as members of the jury, whether or not any false testimony given by the defendant was wilfully done, and whether or not in part the evidence which he gave at that time was false, and knowingly and wilfully false, known to him to be false, and given with the intent to deceive the Court and the jury in that case.

Again, you must find whether or not the assertion made by the defendant at that time was an absolute one, upon which there could be no question of what he really testified to, considering all the testimony in that case.

I think I have sufficiently outlined, ladies and gentlemen, the matters which govern the situation upon which you are to review this testimony and give your decision in a verdict of guilty or not guilty.

I have charged you that the testimony given upon that trial was material to the inquiry then being conducted, because it was admitted in evidence by the trial court there, and in addition it tended to test the credibility of the defendant who was a witness in his own behalf in that case, and in addition it was testimony given in regard to some transactions which were being inquired into under the counts which were submitted to the jury in that case.

I am not going to review the testimony in this case, ladies and gentlemen; it is comparatively simple, and you will remember perhaps more distinctly than the Court would. I only call your attention to the different trends of testimony and the theories of the Government and the defendant in the evidence which has been offered.

The Government offers in support of the indictment here that there was a statement made by the defendant, a signed statement, which was taken under oath, that he did purchase these tires, and in addition to that witnesses have testified that he did purchase the tires, and that they assisted in conducting the sale, or bringing about the sale, or had something to do with the negotiations, but that he purchased the tires, and it seems to me undisputed that the tires were subsequently delivered in a truck which the Government, at least, claims was a truck belonging to the defendant, and that they were delivered to his agent or employee, Mr. Evans, some place in New Jersey, and subsequently returned here to Philadelphia.

On the other hand the defendant absolutely denies this line of testimony as offered by the Government in the case. He states that what he said upon the former trial was true, and not false. He says that it was a transaction in which he was not the real party becoming the purchaser of the tires, but that they were purchased through an arrangement in which he loaned the money. If you find, of course, that that was the condition governing this transaction it would seem that the defendant did not testify falsely on his first trial.

On the other hand if you find that the Government's contention is true, that he did purchase the tires, and it was his transaction, then it would naturally follow that the defendant testified falsely on the trial in March, 1943.

I will not go further into the matter of discussing the testimony, ladies and gentlemen, and I only go this far so as to call your attention sharply to the issue of fact, which is for you to determine, and not the Court, as to where the truth lies in this case, and, of course, it would be your duty to render your verdict accordingly.

Evidence has been offered as to the good character of the defendant, which is proper evidence, and should be considered by you. This evidence is offered upon the theory that a person who has previously had a good character would be less likely to commit crime than someone who had a bad character, and it is proper evidence, as I say.

Nevertheless, if you should find, within the rule which I shall give you, that the defendant is guilty, then it would be necessary to so state, regardless of the fact that he had a previous good character and reputation.

Evidence of previous good character and reputation is in itself a sufficient ground to raise a reasonable doubt in your mind as to the guilt of the defendant.

In a criminal case the defendant is presumed to be innocent until he is proven guilty beyond a reasonable doubt. Every presumption of innocence goes with him until it is overcome by evidence which convinces a jury beyond a reasonable doubt of his guilt.

A reasonable doubt within the meaning of the law is not every possible doubt, but it is such a doubt as would cause a reasonably careful, and prudent man to pause or hesitate before acting upon matters of serious importance to himself, and it may be said that a reasonable doubt is removed from the mind of a juror if after a full and fair consideration of the evidence he still has an abiding conviction of the guilt of the accused.

You are the sole judges of the questions of fact which are submitted to you in this case. In addition to that you are the judges of the weight to be given to the testimony of the different witnesses who have appeared upon the stand.

In considering this you should give to each witness that degree of credibility which under all the circumstances he seems to be entitled to. Consider his demeanor upon the stand, his interest in the result of the lawsuit, and his knowledge of the facts in regard to which he purports to testify.

The defendant has testified in his own behalf, which he has the right to do, and you will consider his evidence by the same rule which I have given you for that of witnesses generally, but with this in addition: You have the right to take into consideration that he is the defendant in the case as that circumstance may or may not in your opinion affect his credibility.

You will take this case then, ladies and gentlemen, give to it your best effort, and apply to it your good common sense as men and women of affairs.

These instructions should be taken all together, and not singly, as the law of this case.

Are there any additional instructions requested other than those which I have submitted, or any exceptions?

Mr. Zion: If the Court please, I do not know your procedure. You did not rule on my request for points for charge.

The Court: I did rule. It is with the Clerk.

The Clerk: They were denied.

Mr. Zion: You have ruled?

The Court: Yes.

Mr. Zion: Will you note these exceptions. I take exception only to that part of your charge, sir, where you said that you will direct that the matter was material to the issues.

The Court: You may have a exception to that.

Mr. Zion: That was the discussion we had in court.

The Court: Yes.

Mr. Zion: Now, I will ask that the Court call to the attention of the jury also that in the testimony at the prior trial there are a vagueness and difference—

The Court: I have instructed them already that the assertion must be absolute, which covers that situation. I will not go into a review any further.

Mr. Zion: All right, sir.

The Court: Anything further?

(No response.)

The Court: If not, swear the bailiff.

Ladies and gentlemen, I send the exhibits to you, which includes the first indictment in that case and the other exhibits which have been offered in evidence.

(The jury retired at 11:45 o'clock A. M.)

(Recess, 12:45 until 2:00 P. M.)

After Recess.

Present: Counsel as before noted.

(The defendant submitted the following points for charge:

"DEFENDANT'S REQUEST FOR POINTS OF CHARGE.

"1 That from the beginning of the trial, until the end, the District Attorney has the burden of establishing beyond a reasonable doubt, every fact essential to the conviction of the defendant; the defendant has no burden to sustain; it is enough that his evidence, taken with the Government's, raises a reasonable doubt as to his guilt, in which case he must be acquitted.

"2. That the defendant is presumed to be innocent, and this presumption continues throughout the trial and during the deliberations of the jury, and is overcome when, and only when, their guilt is established beyond a reasonable doubt.

"3. In order to convict this defendant of perjury, the Government must produce testimony of a more direct and positive character, than is required to justify a verdict of guilty of other offenses.

Hunt vs. United States, 131 F. 2d 59;
United States vs. Buckner, 118 F. (2d) 468;
Cohen vs. United States, 27 F. (2d) 712.

"4. The Government's evidence must be clear, convincing and direct. Not only must you be satisfied of defendant's guilt beyond a reasonable doubt, but the Government must prove the falsity of the matter sworn to by him, by direct and positive evidence. Unless you are so satisfied, then you must find defendant not guilty.

Clayton vs. United States, 284 F. 537.

"5. An oath not required to be administered by any law or rule of court, even though false, is not perjury, although administered under the usage of an administerial officer.

United States vs. Babcock, Fed. Case No. 14,488.

"6. I direct you that an oath taken by this defendant to any letter, order or other writing, even though administered by a Notary Public duly authorized to administer oaths, when not required to be administered by any law or rule of court, is not perjury even though false.

"7. (a) In a prosecution of perjury, there is a strong presumption of innocence, and therefore, credit must be given to what the defendant may have said under oath rather than to what he may have said to the contrary when not under oath.

"7. (b) If you find that the defendant made oath to contradictory statements, you may not convict the defendant of perjury unless the Government can show that he deliberately made oath to a statement which was false and which of those statements were false.

"8. The Government must establish the falsity of the statement alleged to have been made by the defendant under oath, by the testimony of two independent witnesses or one witness and corroborating circumstances. Unless that has been done, you must find defendant not guilty.

"9. (a) Whenever a circumstance relied on as evidence of criminal action, is susceptible of two inferences, one of which is in favor of innocence, such circumstance is robbed of all probative value, even though from the other inference, guilt may be fairly deducible.

(b) Therefore, if you find that the acts and circumstances relied on by the Government to sustain the charge of guilt of the defendant, is susceptible of an inference of innocence, then you must find the defendant not guilty as charged.

"10. If after you have retired, there arises a disagreement between you as to any part of the testimony, or if you desire to be informed of a point of law arising in the case, you must ask to be brought back into the Court and the information will then be given to you.

"11. Under all the evidence presented in this case, your verdict must be for the defendant.

/s/ Peter P. Zion
Attorney for Defendant."

(At 4:35 P. M. the jury returned to open court and rendered its verdict of

GUILTY.)

THE COURT: Ladies and gentlemen, you may be discharged from further consideration of this case.

MR. ZION: If the Court please, will you grant me a few days to file a motion for an arrest of judgment and a motion for a new trial.

THE COURT: Is there any objection to that?

MR. CURTIN: I have no objection, sir.

THE COURT: Three days I think will be sufficient.

MR. ZION: May the defendant be continued on the same bail? It is $1500.

MR. CURTIN: No objection.

THE COURT: The defendant may be released on bail?

MR. CURTIN: His bail then stands until final sentence. Do you want to set a date, if Your Honor please?

THE COURT: How about Monday?

MR. ZION: I was hoping that possibly I could get the notes. That is what I would like to have.

THE COURT: I can give you until Wednesday.

MR. ZION: That will be a little better.

THE COURT: Wednesday at ten o'clock.

GOVERNMENT'S EXHIBIT NO. 1.

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

UNITED STATES OF AMERICA *vs.* LEE F. WEILER ELLWOOD T. EVANS.	No. 10694. December Sessions, 1942. Unlawfully concealing material facts in a matter within the jurisdiction of the United States or agency thereof; conspiracy to defraud the United States, to wit: making false representations in a matter within the jurisdiction of the United States or an agency thereof.

INDICTMENT.

(Filed Feb. 11, 1943.)

COUNT I.

1. The Grand Inquest of the United States of America, inquiring in and for the Eastern District of Pennsylvania,

upon their respective oaths and affirmations, do present that heretofore, to wit: on or about December 27, 1941 and divers dates theretofore and thereafter, at Philadelphia, in the Eastern District of Pennsylvania and within the jurisdiction of this Court, LEE F. WEILER and ELLWOOD T. EVANS were engaged in business as the owner and manager respectively of the Brewerytown Garage, located at 1241 N. 31st Street, Philadelphia, and in such capacity they were then and there persons dealing in rubber tires, tubes and other rubber products, and, as such, under the rules and regulations of the Office of Price Administration.

2. At all times herein mentioned the Office of Production Management was an agency of the Government of the United States of America, engaged in promulgating and administering priority and allocation regulations with respect to materials required for national defense, including rubber, rubber tires and tubes, and other rubber products.

3. On or about December 10, 1941, said Office of Production Management, by J. S. Knowlson, Acting Director of Priorities, made, issued and duly promulgated an order entitled "Supplementary Order No. M-15-b" prohibiting throughout the United States of America the sale of new rubber tires and tubes from that date until December 22, 1941, except when sold as a part of new or used vehicles.

4. On or about December 19, 1941, said Office of Production Management, by Donald M. Nelson, Director of Priorities, made, issued, and duly promulgated an order entitled "Amendment No. 1 to Supplementary Order M-15-b to Restrict the Use of Rubber" which extended said prohibition of new rubber tire and tube sales from December 22, 1941 to January 4, 1942, and prohibited the sale of new rubber tires and tubes as a part of used vehicles.

5. On or about December 27, 1941, said Office of Pro-

duction Management, by Donald M. Nelson, Director of Priorities, with the written approval of the President of the United States of America, made, issued and duly promulgated an order entitled "Supplementary Order No. M-15-c to Restrict Transactions in New Rubber Tires, Casings, and Tubes," which established rubber tires and tube rationing regulations prohibiting all further sales and deliveries of new rubber tires and tubes on and after that date, except in accordance with such regulations, and which granted to the Office of Price Administration the authority to enforce and carry out said regulations and to promulgate and enforce further regulations for that purpose. At all times mentioned in this Indictment Office of Price Administration has been an agency of the Government of the United States of America, and since December 27, 1941 has been continuously engaged in enforcing and administering all of the aforementioned rubber tire and tube rationing regulations.

6. On December 30, 1941, said Office of Price Administration regularly made, issued and duly promulgated rubber tire regulations effective on and after January 5, 1942, which prohibited throughout the United States of America the sale, lease, delivery, trade and transfer of new rubber tires, casings and tubes to consumers and other persons without certificates from the Local Tire Rationing Boards, as provided in said regulations.

7. The defendants, on or about the 27th day of December, 1941, in Philadelphia, in the Eastern District of Pennsylvania, and within the jurisdiction of this Court, did knowingly and wilfully make a sale to George Gordon, trading as Farbstein Service Station, 57th and Berks Streets, Philadelphia, of ninety-eight (98) new rubber tires and one hundred forty-four (144) new rubber tubes, amounting to $1,312.24; and said defendants, at the said time and place, did knowingly, wilfully, unlawfully and feloniously falsify, conceal and cover up by a trick,

scheme and device, to wit: a false and fraudulent sales invoice, a material fact, and did make and use and cause to be made and used a false invoice, knowing the same to contain a fraudulent and fictitious statement in a matter within the jurisdiction of the Office of Production Management and the Office of Price Administration, then and there being governmental departments and agencies of the United States; a copy of said false and fraudulent sales invoice is as follows:

"BREWERYTOWN GARAGE
Distributor of
Ronson 100% Pure Penna. Oil & Lubricants
Firestone Tires, Batteries & Auto Supplies
S. E. Cor. 31st & Thompson Sts.,
Philadelphia, Pa.

Race 3749 Pop 9027

No. 3801 Date 12-1-1941

Sold to Farbstein Service Station
57th & Berks St.

Quant.	Part No.	Articles	Price	Amount
50	600x16	Deluxe White	10.00	500.00
16	650x16	" Black	11.28	169.20
11	650x16	Imperials	8.76	96.36
11	700x16	Deluxe White	14.00	154.00
72	SD 16	Goodrich Tubes	1.36	97.92
72	D 16	Goodyear Tubes	1.83	131.76
				1149.24
10	700x16	Cooper 5 pkg.	15.40	154.00
1	600x16	Cooper Block		9.00
				1312.24

Tax included
Paid by
check #548 12-1-41
E. T. EVANS"

8. The said invoice was false and fraudulent in that said sale was not made and consummated on the day alleged therein, to wit: December 1, 1942, but, on the contrary, was made and consummated on December 27, 1942, and said false and fraudulent date, December 1, 1942, was inserted by the defendants as a trick, scheme and device, wilfully and unlawfully to conceal and cover up the fact that said sale included new tires and tubes, and was accordingly subject to certain restrictions on sales and purchases, as aforesaid:

Contrary to the form of the Act of Congress in such case made and provided and against the peace and dignity of the United States of America.

COUNT II.

And the Grand Inquest aforesaid, inquiring as aforesaid, upon their respective oaths and affirmations, do further herein present, reaffirm, reallege and incorporate, as if here set forth in full, all of the allegations of the first count of this Indictment except those contained in paragraphs 7 and 8 inclusive.

7. And the Grand Inquest aforesaid, inquiring as aforesaid, do further present that heretofore, to wit: on or about December 12, 1941, and divers dates theretofore and thereafter, at Philadelphia, in the Eastern District of Pennsylvania, and within the jurisdiction of this Court, Lee F. Weiler and Ellwood T. Evans did knowingly, wilfully, unlawfully and feloniously conspire, combine, confederate and agree together and with one another to defraud the United States of America by selling and transferring new rubber tires and tubes, notwithstanding the provisions of Supplementary Order M-15-b, hereinabove mentioned in Paragraph 3.

8. It was further a part of said conspiracy that the defendants would make false bills or invoices reflecting

said sales or transfers of new rubber tires and tubes, in order to conceal and cover up by a trick, scheme and device, a material fact or facts within the jurisdiction of the Office of Production Management and the Office of Price Administration, then and there being governmental departments and agencies of the United States.

9. It was further a part of said conspiracy that the defendants would not keep records of the sales or transfers of new rubber tires and tubes.

10. It was further a part of said conspiracy that the defendants would not file an inventory of new rubber tires and tubes as of December 12, 1941, required to be filed by the Office of Production Management and the Office of Price Administration on Form PD-216 on or before December 31, 1941.

11. In pursuance of said conspiracy and to effect the object thereof, the defendants committed the following overt acts:

(a) The defendants on or about December 27, 1941, made a false bill or invoice, No. 3801, covering the sale of ninety-eight (98) new rubber tires and one hundred forty-four (144) new rubber tubes to George Gordon, trading as Farbstein Service Station, 57th and Berks Streets, Philadelphia, Pennsylvania, by dating said bill or invoice December 1, 1941, instead of December 27, 1941.

(b) The defendants on or about December 27, 1941, solicited George Gordon to date a check No. 548, in the amount of $1,312.24, drawn on City National Bank of Philadelphia, payable to the order of Lee F. Weiler, and signed by Edith Farbstein as maker, on behalf of Farbstein Service Station, said check being given in payment of said ninety-eight (98) new rubber tires and one hundred forty-four (144) new rubber tubes, "December 1, 1941," instead of "December 27, 1941."

(c) On and after December 12, 1941, the defendants knowingly, and wilfully failed to keep records of the names of consumers and other persons to whom sales and transfers of new rubber tires and tubes were made by defendants.

(d) On or before December 31, 1941, the defendants knowingly and wilfully failed to file an inventory on Form PD-216, of new rubber tires and tubes as of December 12, 1941:

Contrary to the form of the Act of Congress in such case made and provided and against the peace and dignity of the United States of America.

COUNT III.

And the Grand Inquest aforesaid, inquiring as aforesaid, upon their respective oaths and affirmations, do further herein present, reaffirm, reallege and incorporate, as if here set forth in full, all of the allegations of the first count of this Indictment except those contained in paragraphs 7 and 8 inclusive.

7. And the Grand Inquest aforesaid, inquiring as aforesaid, do further present that heretofore, to wit: on or about January 20, 1942 and divers dates theretofore and thereafter, at Philadelphia, in the Eastern District of Pennsylvania, and within the jurisdiction of this Court, Lee F. Weiler and Ellwood T. Evans did knowingly and wilfully make a purchase of one hundred five (105) new rubber tires for $1,485.00 from Charles Moss, trading as Moss Service Garages, at 49th Street and Baltimore Avenue, Philadelphia, and said defendants, at said time and place, did knowingly, wilfully, unlawfully and feloniously falsify and conceal and cover up by a trick, scheme and device, to wit: a fraudulent and fictitious order blank and receipt, material facts, and did make and use and cause to be made and used a fraudulent and fictitious order blank and receipt, knowing the same to contain a fraudulent and

fictitious statement in a matter within the jurisdiction of the Office of Price Administration, then and there being a governmental department and agency of the United States, a copy of said receipt being as follows:

"ALLEN TIRE CO.
"Chester's Foremost Tire Specialists"
S. W. 9th (at Sproul) St. Phone 2-2020
Chester, Pa.
Date 1-20-42

To Mr. Chas. Moss
49th & Baltimore Ave.
Phila.
Purchase Order

75	650x16	U. S. Deluxe Csg.	$15.00	$1125.00
30	625x16	U. S. Deluxe Csg.	12.00	360.00
				$1485.00

Del to Bearer
T. O'Brien"

said order blank and receipt contained fraudulent and fictitious statements in that:

(a) Said purchase, represented by said order blank and receipt, was not made by Allen Tire Company, nor by its authority, nor with its approval, but was made by defendants;

(b) Defendant Ellwood T. Evans falsely represented that he was connected with and employed by Allen Tire Company and signed the name "T. O'Brien" on said receipt;

(c) Defendants were not distributors of tires;
and the said fraudulent and fictitious order blank and receipt was made and used by the defendants as a trick, scheme and device, knowingly and wilfully to conceal and cover up the fact that said purchase could not lawfully be made by defendants:

Contrary to the form of the Act of Congress in such case made and provided and against the peace and dignity of the United States of America.

COUNT IV.

And the Grand Inquest aforesaid, inquiring as aforesaid, upon their respective oaths and affirmations, do further herein present, reaffirm, reallege and incorporate, as if here set forth in full, all of the allegations of the first count of this Indictment except those contained in paragraphs 7 and 8 inclusive.

7. And the Grand Inquest aforesaid, inquiring as aforesaid, do further present that heretofore, to wit: on or about January 20, 1942, and divers dates theretofore and thereafter, at Philadelphia, in the Eastern District of Pennsylvania, and within the jurisdiction of this Court, Lee F. Weiler and Ellwood T. Evans did knowingly, wilfully, unlawfully and feloniously conspire, combine, confederate and agree together and with one another to defraud the United States of America by purchasing, selling and transferring new rubber tires and tubes in violation of the rationing regulations of December 30, 1941, effective January 5, 1942, hereinabove mentioned in paragraph 6.

8. It was further a part of said conspiracy that the defendants would make false order blanks and receipts reflecting said purchases or transfers of new rubber tires and tubes in order to conceal and cover up by a trick, scheme and device material facts within the jurisdiction of the Office of Price Administration, then and there being a governmental department or agency of the United States.

(9) It was further a part of said conspiracy that the defendants would not keep records of the sales or transfers of new rubber tires and tubes.

10. In pursuance thereof the defendants committed the following over acts:

(a) The defendants on or about January 20, 1942 falsely represented to Charles Moss, trading as Moss Service Garages, that defendants represented, were connected with, and were employed by Allen Tire Company, wholesale and retail distributors of tires in Chester, Pennsylvania.

(b) The defendants on or about January 20, 1942, by virtue of said false representation, induced Charles Moss to sell defendants, trading as Allen Tire Company, one hundred five (105) new rubber tires for $1,485.00.

(c) The defendants on or about January 20, 1942, delivered and caused to be delivered to Charles Moss, trading as Moss Service Garages, a fraudulent or fictitious order blank and receipt for the purchase of tires on the stationery of the Allen Tire Company.

(d) The defendants on or about January 20, 1942, received delivery of said one hundred five (105) new rubber tires.

(e) On or after January 20, 1942, the defendants knowingly and wilfully failed to keep records of the names of consumers and other persons to whom sales and transfers of new rubber tires and tubes were made by defendants:

Contrary to the form of the Act of Congress in such case made and provided and against the peace and dignity of the United States of America.

Gerald A. Gleeson,
United States Attorney.

Philadelphia, Pa.
10 February, 1943.
True Bill
Nathan R. Rambo
Foreman.

ARRAIGNMENT AND PLEA.

And now, this 5th day of March, A. D. 1943, the defendants being arraigned say they Not Guilty in the manner and form as they stand indicted, and of this, etc.,

GOVERNMENT'S EXHIBIT NO. 2.*

(This Exhibit, page 1.)

IN THE
DISTRICT COURT OF THE UNITED STATES
For the Eastern District of Pennsylvania.

United States of America :
v. : No. 10,694.
Lee F. Weiler, : December Session, 1942.
Ellwood T. Evans. :

Philadelphia, Pa., March 24, 1943.

Before Hon. Harry E. Kalodner and a Jury.

Present:

Thomas H. Curtin, Esq., Assistant United States Attorney, for the Government;

Peter P. Zion, Esq., for the Defendant.

Second Day.

The Court: All right, proceed, Mr. Zion.

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*In order to conform to Rule 75(e) of the Federal Rules of Civil Procedure and to make it more convenient for this Court, the portions of this Exhibit, which were read into the Record (N. T. 7-22, line 13 inclusive) have been interspersed here quoted and indented. The interjections of the Court below and Attorneys for Plaintiff and Defendant have been interspersed in italics. All other portions of this Exhibit have been printed in the usual style as prescribed by the Rules of this Court.

(This Exhibit, page 2.)

Lee F. Weiler, having been duly sworn, was examined and testified as follows:

Direct-examination.

* * * * * * * *

* * * * * * * *

By Mr. Zion:

Q. Now, Mr. Weiler, you know Charles Moss, the man who testified in this issue?

A. Yes, sir.

Q. How long have you known him?

A. About five or six years.

Q. Did you ever call at his place of business in company with Mr. Evans?

A. I did.

Q. Did you ever call at his place of business in company with Mr. Evans on January 20, 1942?

A. I did, yes, sir.

By The Court:

Q. You called on Mr. Moss with Mr. Evans?

A. Yes, sir.

Q. When?

A. Several occasions. I went there to buy motor oil.

(This Exhibit, page 3.)

Q. When?

A. On what particular day?

Q. Yes, what day of the week?

A. On an average of twice a month we went there.

Q. During what month,—when did you first go there? Evans went to work for you in 1941, when was the first time that you went there after that?

A. Sometime during October.

Q. How many times in October?

A. I would say we went there twice a month.

Q. That is twice in October?

A. Yes, sir.

Q. And twice in November and twice in December?

A. Yes, sir.

THE COURT: All right.

By MR. ZION:

Q. Mr. Weiler, while at Mr. Moss's place of business with Mr. Evans did Mr. Evans ever talk or participate in any conversation with Mr. Moss?

A. Yes, sir.

Q. Do you know whether or not he ever called Mr. Evans by any name?

A. Yes, he knew him, and called him "El".

(This Exhibit, page 4.)

Q. What does "El" mean stand for?

A. Ellwood.

Q. That is Mr. Evans's first name?

A. Yes, sir.

By THE COURT:

Q. Whose first name?

A. Ellwood T. Evans'.

By MR. ZION:

Q. For what purpose did you call up Mr. Moss's place of business?

A. Regarding motor oil and batteries.

Q. Did you do any business in batteries with Mr. Moss?

A. Yes, sir. Mr. Evans, he bought a number of batteries off him at a ridiculous low price.

Q. Mr. Weiler, were there any other people present at times when you and Mr. Evans went out to Mr. Moss during the period you spoke of, October, November and December, 1941?

A. Yes, sir.

Q. Give me the names of some of the people who were present on those occasions?

A. His manager, Morton Blatt.

Q. Did Mr. Blatt participate in these conversations?

(This Exhibit, page 5.)

A. Yes, he knew Evans for years.

Q. Did you hear Mr. Blatt address Mr. Evans by any name?

A. Yes, he calls him "El".

Q. Was that ever done in the presence of Mr. Moss?

A. Yes, sir.

Q. Did you ever hear Mr. Evans talk to Mr. Moss?

A. Sure, he talked.

THE COURT: He already said that, he said that he did the negotiating.

By MR. ZION:

Q. Did he address him by any name?

A. Charlie.

By THE COURT:

Q. Is that Moss's first name?

A. Yes, sir.

Q. Now, this conversation you say took place, or these conversations took place during October, November and December?

A. Roughly, yes, sir.

THE COURT: All right.

By MR. ZION:

Q. Mr. Weiler, did you ever make any agreement or

(This Exhibit, page 6.)

arrangement with Mr. Evans that you should not keep records of any transactions of any kind at your place of business?

A. I did not.

Q. You testified that you actually did keep these records?

A. Yes, we have them here.

The Court: He said three times that he kept records.

Mr. Zion: Cross-examine.

Cross-examination.

By Mr. Curtin:

Q. You were the owner of the place, were you not?

A. Yes, sir.

Q. You gave Mr. Evans instructions as to how he should operate the business or what he should do there?

A. Did I give him instructions?

Q. Yes, sir.

A. What kind of answer did you want or—

The Court: You just answer the question.

The Witness: Sure, I gave him instructions.

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(This Exhibit, page 7.)

By Mr. Curtin:

Q. Did you file PD-216, which is the inventory form?

A. I did not.

Q. You were Chairman of the Rationing Board?

A. That is right.

The Court: That is an inventory of—

Mr. Curtin: That is an inventory of stock on hand as of the date of the freezing order.

Mr. Zion: Which had to be filed on or before December 31, 1941.

By Mr. Curtin:

Q. Did you ever file it?

A. I did not.

By The Court:

Q. I will ask you again, did you keep records of sales from the date of the freezing order?

A. Yes, I have that.

Q. Are they here?

A. Some of them are here. After all, I am out of business and I do not have all my records.

Can I explain?

Q. Yes.

A. I was going out of business,—the tire business.

(This Exhibit, page 8.)

and I had no reason to file a report because I was selling all my tires on hand.

By Mr. Curtin:

Q. You mean that you had sold all of them?

By The Court:

Q. When did you go out of business?

A. I sold the building and wound up this year, January 16th.

Q. 1943?

A. Yes, sir.

By Mr. Curtin:

Q. As a matter of fact, you bought tires in April, 1942?

A. I did not.

Starting testimony read into record.

"A. (N. T. p. 7)

THE COURT: When was the filing of this inventory required, Mr. Curtin, or called for?

MR. ZION: December 31st.

THE COURT: When was the call made for it?

MR. CURTIN: December 31st. Mr. Steinbrook testified that there never was any extension of that date, and that it was to be filed by December 31st.

BY THE COURT:

Q. And why did you say you didn't file such a report?"

Ending testimony read into record.

MR. CURTIN (N. T. p. 7.)

Q. This answer is by whom?

A. By L. F. Weiler.

Q. Go ahead.

(This Exhibit, page 9.)

Starting testimony read into record.

"A. (N. T. pp. 7, 8.)

A. We got PD-216 on January 5, 1942, and it said on the face of it it must be filed before December 31, 1941.

Q. All right

A. What's the use of filing it?

Q. I thought you said a minute ago that you didn't file it because you were winding up your business?

A. That is quite it,—every three months you had to file.

Q. You say that you were to file one every three months?

A. Yes, sir.

Q. Did you file one for the first three months of 1942?

A. No, sir. That was in March, and I had no tires then.

By Mr. Zion:

Q. What is that?

A. I had no tires in March.

By Mr. Curtin:

Q. You said that you had no tires in March?"

Ending testimony read into record.

Mr. Curtin: (N. T. p. 8.)

Q. I want you to stop there and turn—I beg your pardon; did you finish that? You are reading now from the top of Page 10, are you?

A. Bottom of Page 9, Mr. Curtin.

Q. Go ahead; I beg your pardon.

Starting testimony read into record.

"A. (N. T. pp. 8, 9)

The Court: And that he didn't file any report because he was going out of business.

The Witness: The first one I couldn't file because on the face of it it was void, and the next one came three months later, and I had no stock.

(This Exhibit, page 10.)

By Mr. Curtin:

Q. As a matter of fact, didn't you buy tires in March, 1942?

A. I did not."

Ending testimony read into record.

Mr. Curtin: (N. T. p. 9.) *If your Honor please, I ask the witness now, subject to my friend's desiring any further quote at this particular point, to turn to the next—*

Mr. Zion: *I wish to make a motion now, sir, although I don't expect the Court to rule on it. I will ask the Court to permit me to make a motion. I move to strike out the testimony that was read at this time because it does not appear on its face that it is material to the issue.*

THE COURT: *It gives a history of the transaction. Your objection will be overruled.*

By MR. CURTIN:

Q. I now direct you to turn to Page 12 at the bottom, the last question on Page 12. (For testimony read into record here see pages 125a-129a inclusive.)

By THE COURT:

Q. What was the last day that you made any sales of tires?

A. Sometime in March, your Honor.

Q. March of what year?

A. That is March, 1942.

Q. What was the last tires that you bought?

A. I couldn't answer that.

Q. Well, about when?

A. The last,—I would say about October.

Q. Of what year?

A. 1941.

Q. October, 1941?

A. That is a quantity of tires I picked up for certificate purchasers.

Q. I don't care what the transaction was. When was it that you last bought tires for your place of business? When was the last time that you bought a tire or tires?

A. As late as three months ago.

(This Exhibit, page 11.)

Q. That is about January of this year, just prior to the winding up of your business?

A. That is right.

Q. How many times would you say you bought tires?

A. Whatever the certificate called for, two, three, or four.

Q. You mean that you bought them to fill orders?

A. Yes, sir.

Q. You made no other purchases?

A. No.

By Mr. Curtin:

Q. In other words, the last bulk transaction that you had of any size was in October, 1942?

A. That is right.

Q. I show you what I have marked for identification as Government's Exhibit 6—

(The letter referred to, dated March 24, 1942, was marked Government's Exhibit 6 for identification.)

Q. And ask you if that is your signature on that?

A. Yes, sir.

Q. I show you what I have marked for identification as Government's Exhibit 7—

(The document referred to, dated March 16, 1942,

(This Exhibit, page 12.)

was marked Government's Exhibit 7 for identification.)

Q. —and ask you if you ever saw the original of that invoice?

A. I did not.

Q. You did not?

A. No, sir.

The Court: Does it have a signature on it, Exhibit 7?

Mr. Curtin: Government's Exhibit 6 has his signature.

The Court: And how about Exhibit 7?

Mr. Curtin: It has initials on it, but you can see what it calls for. (Producing same.)

"A. (N. T. p. 9) By The Court:"

Q. Are these your initials on it? (Indicating.)

A. I never saw this.

Q. You never saw that paper?

A. No, sir. (Witness examines same.) No, sir, I did not—at no time.

Q. You see what it is for?

A. For the purchase of tires.

Mr. Curtin: (N. T. p. 9.) *Just a minute. It is stipulated by counsel, if your Honor please, that the answers we are referring to each time are the answers of the defendant Weiler, so when he says "answer" you will know that the answer means Mr. Weiler.*

Mr. Zion: (N. T. p. 10) *That is correct.*

By Mr. Curtin:

Q. Go ahead.

Starting testimony read into record at 123a.

"A. (N. T. pp. 10, 11)

Q. Did you purchase these tires?

A. I did not.

(This Exhibit, page 13.)

Q. You didn't purchase them?

A. Absolutely not.

Q. Who ordered them?

A. I did.

Q. Then you never got them?

A. No, sir.

Q. In other words, Government's Exhibit 6 is a letter addressed to the United Petroleum Corporation, dated March 24, 1942, in which you state:

> "Inasmuch as you are a distributor we have purchased from you 150 600 x 15 Standard and Convoy tires and 20 625—50 x 16 Standard tires under date of March 16th."

That is a total of 170 tires?

A. That is right.

Q. And did you make that statement?

A. I did write that.

Q. You state in that letter that you purchased them?

A. That is right.

Q. And now why did you say that you didn't?

A. Do you want an explanation of the whole transaction?

Q. Just answer the questions now.

By Mr. Curtin:

Q. First you said that you didn't purchase them,

(This Exhibit, page 14.)

and that you say in that letter—

A. That is right—I never received them, and didn't purchase them.

Q. Why did you sign that letter, then?

A. I want to explain—

Q. All right.

A. The manager for the concern, the United Petroleum Corporation, disposed of some tires, and he asked me whether I would write these people a letter explaining I was in a position and was allowed to buy these tires—which I did. They printed this, and I signed it.

Q. And swore to it?

A. That wasn't on there when I wrote the name there. (Indicating.)

Q. Are you sure about it?"

A. I wrote this at my place of business.

Q. You are pretty sure about it?

"A. (N. T. 11-15 inc.)

A. It is so far back—

Q. This is only March, 1942.

A. That is right.

Q. You remember the transaction, somebody came to you and said, 'Will you sign the letter'?

A. That is right.

Q. That is a pretty good transaction?

(This Exhibit, page 15.)

A. Yes, sir.

Q. It was an accommodation on your part, was that it?

A. That is right.

Q. You remember that?

A. Yes, sir.

Q. Don't you remember whether or not you signed that and swore to it in the presence of a Notary Public?

A. I couldn't answer.

Q. You don't remember that?

A. No, I do not.

Q. Would you say that you had not?

A. I know my signature.—

Q. Would you say that you had not sworn to it and taken an affidavit?

A. No, I would not.

Q. You would not say that you had and you would not say that you had not?

A. No, sir.

Q. Your memory doesn't serve you on that?

A. No, sir.

Q. You are positive that you never received the tires?

A. I know I never got them.

Q. Why did you sign this letter, then?

A. A man came to me.—Mr.—

(This Exhibit, page 16.)

Q. Who is the man?

A. Mr. Sweeney, the manager of the United Petroleum Corporation.

Q. In other words, you mean the manager came to you and said, 'Will you sign a letter for these tires'?

A. That is right.

Q. Because—

A. He said they were going to send them back to the Firestone Tire and Rubber Company, and they had a chance to make some money. I think $4.67 was their price, and by selling to a dealer they could get more money for them, and he asked if I would buy them. He said he had a dealer and—

Q. In other words, it was a "cover-up" for somebody else?

A. No.

Q. Why did you need to give him this letter, then?

A. I believe Dan The Tire Man, that got the tires,—he admits having the tires through the OPA, and I loaned him the money to pay for the tires.

Q. You knew, didn't you—you are chairman of the Tire Rationing Board which rations tires?

A. Yes, sir.

Q. And you knew that certain safe-guards were

(This Exhibit, page 17.)

erected or created by the Government so as to make sure that tires were only sold in accordance with the strict letter of the ration regulations?

A. That is right.

Q. Is this in accordance with those regulations?

A. Yes, sir,—dealer to dealer.

Q. But you said you didn't buy these?

A. I bought them for—I didn't take possession here.

Q. Did you buy these tires or didn't you?

A. No, I didn't buy them.

Q. You just—

A. I loaned my money to buy them.

Q. Did you get these tires?

A No.

Q. Did you actually buy them for yourself?

A. No.

Q. You stated in the letter that you bought them?

A. That is right.

Q. And you don't remember whether you swore to it under oath?

A. No.

Q. You wouldn't say that you didn't?

A. No."

Ending testimony read into record at 123a.

Mr. Curtis (N. T. p. 15):

Q. I ask you now to turn to Page 19 at the top starting with the question "Had you purchased . . ." (For testimony read into record here see page 130a.)

Q. Didn't you know that wasn't the right thing to do?

(This Exhibit, page 18.)

A. I thought it was all right. I could have bought them.

Q. Why did the United Petroleum Corporation need that letter?

A. For their files to show where the tires went.

Q. Exactly.

A. In fact, they didn't need this letter.

Q. You signed it because you thought they needed it?

A. That is right. I never got a bill and never received any tires, and never paid the bill.

Q. You never owed them anything?

A. No.

Q. In other words, you wrote the letter and said that you had bought tires—

A. That is right,—these tires already delivered to Mr. Sweeney.

Q. You said that you had bought them?

A. That is right.

Q. And you had not?

A. That is right.

Q. So that you were making a mistake?

A. I wouldn't say a mistake. I was going to take—

Q. This letter doesn't say, "I am going to"—

A. "Inasmuch as * * * * we have purchased"—

(This Exhibit, page 19.)

Q. "Inasmuch as you are a distributor we have purchased from you"—

A. That is right.

Q. Was that a correct statement?

A. Yes.

Starting testimony read into record at 129a.

"A. (N. T. p. 15.)

Q. Had you purchased them?

A. No, I didn't buy them.

Q. But you said you did?

A. In this letter I did. Mr. Sweeney had bought them."

Ending testimony read into record at 129a.

Mr. Curtin (N. T. p. 15):

Q. I direct you now to turn to page 20 in the middle, which is the next statement alleged in the indictment, starting "Did you loan somebody some money to buy the tires?" (For testimony read into record here see pages 131a, 132a.)

Q. If you had not bought them, and you say that you didn't, then that statement is a mis-statement?

A. I didn't buy them; he bought them.

Q. I will direct that you answer my question.

A. Yes, sir.

Q. In that letter you said that 'we have purchased'?

A. Yes, sir.

Q. And you didn't purchase any?

A. No, I did not. I did not purchase them for my own use.

Q. Did you purchase them for anybody else?

A. Yes.

Q. What do you mean that you didn't purchase them?

(This Exhibit, page 20.)

A. I never received them. My notion is a purchaser—if you receive and pay for them.

Q. You mean to say that you purchased them for somebody else?

A. Yes, sir.

Q. And who paid for them?

A. When they were sold I was paid off. Mr. Roche sold the tires.

Q. Why were you paid off?

A. I loaned Mr. Roche the money to buy them. I didn't buy them, and I didn't pay for them direct.

Starting testimony read into record at 130a.

"A. (N. T. pp. 15-18 inc.)

Q. Did you loan somebody some money to buy the tires?

A. Yes, sir, I did.

Q. And they were the buyers of the tires?

A. That is quite right.

Q. You were not the purchaser of the tires, is that correct?

A. Yes, sir.

Q. Why did you say in your letter that you were the purchaser?

A. I was the go-between. I was buyer of the tires through United; he had already got them when this thing was signed.

(This Exhibit, page 21.)

Q. Let me ask you again—first of all, you didn't get the tires?

A. No, sir.

Q. Dan, The Tire Man got them?

A. Yes, sir, that is right.

Q. Did Dan, The Tire Man, buy them?

A. I don't know who bought them. Mr. Sweeney bought the tires.

Q. Then the seller bought the tires?

A. Yes, he knew his agent was at the end of this deal.

Q. Then the seller bought the tires?

A. The representative of the seller.

Q. The employee of the seller?

A. Sweeney.

Q. Sweeney was what,—what was his position?

A. Manager.

Q. In other words, the manager of the selling company was the real buyer of the tires?

A. That is right.

Q. And did you loan him the money?

A. No, I loaned it to Mr. Roche.

Q. And who is he?

A. Dan, The Tire Man, the ultimate buyer of the tires.

Q. Sweeney sold them to Dan, the Tire Man?

(This Exhibit, page 22.)

A. That is right.

Q. And you loaned the money to Dan, The Tire Man, to buy them?

A. That is right.

Q. The first purchaser was Sweeney?

A. That is right.

Q. And the second purchaser was Dan, The Tire Man?

A. That is right.

Q. And you financed the transaction?

A. That is quite right.

Q. You didn't buy the tires yourself?

A. No.

Q. When you stated in your letter that you did buy them, that is a mis-statement?

A. That is quite right, but it was an indirect buy."

Ending testimony read into record at 130a.

Mr. Curtin (N. T. p. 18):

Q. I ask you now to turn to page 24, in the middle. This is a question by the Court where the Court is interro-

gating the defendant. (For testimony read into record here see pages 134a, 135a.)

Q. You were simply the finance agent?

A. For this particular thing. I loaned him money several times.

Q. Then, you made a mis-statement when you said that you bought them?

A. That is quite right on that basis. See, this was brought to me after the tires were delivered; I never saw the tires or paid for them.

Q. And you don't know whether you made that misstatement in that letter under oath or not?

(This Exhibit, page 23.)

A. No, I do not.

Q. You would not say whether you did or did not?

A. No, sir.

By Mr. Curtin:

Q. Maybe I can recall your memory by stating that Mr. Oates, the Notary Public, is the office manager of the United Petroleum Corporation.

A. I never saw him; I don't know the people. I never dealt with them.

Q. Does that help you recall whether you took the affidavit before the Notary Public, the fact that he is the office manager of the United Petroleum Corporation?

A. No, sir.

Q. Or the fact that the attorney is Sydney Smith,—would that help you recall anything?

A. No, I don't know either one.

Q. As a matter of fact, you testified that you supplied the money for this transaction?

Mr. Zion: He said that before.

The Witness: I did.

By Mr. Curtin:

Q. You supplied $2,750.00 for this bill?

A. That is right.

(This Exhibit, page 24.)

Q. And you got the tires?

A. I did not.

Q. You had them transferred to somebody else?

A. I did not.

Q. Why would you put a purchase order for these 170 tires and pay $2,750.00 for them and not get the tires?

Mr. Zion: I object to that.

The Court: The objection is overruled.

The Witness: I never received the tires, and loaned this man the money, which is not—

Starting testimony read into record at 132a.

"A. (N. T., pp. 18, 19.)

By The Court:

Q. You loaned Dan, The Tire Man, the money?

A. I did, that is right.

Q. How did you lend it to him, as cash or by check?

A. I believe it was cash.

Q. Twenty-seven hundred and fifty dollars?

A. I couldn't answer whether it was check or cash.

Q. But the amount of the loan was $2,750.00?

A. Roughly, yes, sir. I can't tell you exact.

Q. Was the $2,750.00 bill of sale the only one you had with—

A. I said "roughly". I didn't see the price.

Q. Then you don't know whether it was thirteen hundred dollars or twenty-seven hundred dollars?

(This Exhibit, page 25.)

A. I loaned him the money and—

Q. The bill for the transaction is $1,248.73.

A. I never saw that bill, your Honor.

Q. Does this refer to the transaction of 170 tires for which you loaned the money to Dan, The Tire Man, $1,248.73? (Indicating)

A. Yes.

Q. Does that serve to refresh your memory as to the amount of the loan?

A. No, I just loaned him enough to cover the tires.

Q. So that you loaned him $1,248.73?

A. Yes, sir,—$1,250.00.—whatever it was.

Q. Was that by check or cash?

A. I believe it was cash."

Ending testimony read into record at 132a.

Mr. Curtin (N. T. p. 19):

Q. Now, following the indictment, I ask you to turn to page 32, in the middle, a question by Mr. Curtin. (For testimony read into record see pages 140a to 142a.)

Q. Is that the way that you do business?

A. Yes, I have loaned money—

Q. Ever loaned him any money in cash before the tire rationing went into effect?

A. Yes, sir.

Q. You did business that way?

A. Yes, sir.

By Mr. Curtin:

Q. I would like to correct my statement with reference to the attorney. I said that it was Sydney Smith, but

(This Exhibit, page 26.)

it was Sydney S. Stern, the lawyer for the United Petroleum. Do you know him?

A. No, sir.

Q. As a matter of fact, you gave a purchase order for the Brewerytown Garage to the United Petroleum Corporation confirming this purchase?

Mr. Zion: Note my objection, your Honor.

The Court: Overruled.

The Witness: I don't recall.

By Mr. Curtin:

Q. I show you what I have marked for identification as Government's Exhibit 8, and ask you if you ever saw the original of that photostat before? (Producing same.)

(The form referred to was marked as Government's Exhibit 8 for identification.)

A. No, sir.

Q. Do you recognize the writing of the fellow who signed it,—the gentleman who signed it?

A. (Examining same.) No, sir.

Q. Whose stationery is it?

A. That is stationery I used years ago.

By The Court:

Q. Do you know the Hastings whose name is signed on that?

(This Exhibit, page 23.)

A. No.

Q. Ever hear of him?

A. No, sir.

Q. Can you explain how this man got a hold of your own stationery?

A. No, I don't know. I never heard of Bob Hastings.

By Mr. Curtin:

Q. Government's Exhibit 7, that is a letter addressed to the United Petroleum Corporation with reference to the 170 tires?

A. Yes, sir.

Q. And that predates your confirmation letter? What is the date of that?

A. March 16th.

Q. And the date of your confirmation letter is what?

A. It is March 16th.

Q. Isn't it March 24th, eight days later? (Indicating).

A. Yes, sir.

Q. Didn't you send this confirmation order back to them—

A. No.

Q. Just a minute—didn't you send the confirmation order to them after they had received this order? (Indicating)

(This Exhibit, page 28.)

A. No, sir.

Mr. Zion: I object to that.

The Court: The objection is overruled.

The Witness: I never saw this before (Indicating).

By Mr. Curtin:

Q. Why did you send this confirmation with the affidavit?

Mr. Zion: That is argumentative, your Honor.

The Court: He is under cross-examination.

By Mr. Curtin:

Q. Why did you sign this confirmation with the affidavit on it?

A. This was never sent to me. This was brought to me.

Q. But you signed it?

A. Yes, sir.

Q. And the affidavit is your's?

A. I can't answer that, because they came to my place with this paper and explained to me they wanted me to give them this letter, which I did.

Q. And you gave them that letter?

(This Exhibit, page 29.)

A. I did.

Q. Didn't you ask why they should want you to give them that letter if there was no previous correspondence?

A. There was no previous correspondence.

Q. Did you ask why they should want it?

A. No. I knew they were selling these tires to the man—

By The Court:

Q. To Dan, The Tire Man?

A. Yes.

Q. In other words, you had knowledge of the transaction which is set forth in this letter signed by Bob Hastings?

A. I don't know who Bob Hastings was.

Q. You had knowledge of the transaction in this letter signed by Bob Hastings?

A. That is right.

Q. And you knew that the tires had been delivered on March 16th?

A. That is right.

Q. You knew that the tires had actually been delivered in accordance with that order?

A. That is quite right.

Q. You knew about this delivery? (Indicating.)

(This Exhibit, page 30.)

A. That I never saw before.

Q. But you knew that the tires had been bought—

A. Yes.

Q. On March 16th?

A. Yes; they would not let them out without paying for them.

Q. In other words, you knew the amount of the purchase was about $1,250.00, because that is the amount of money that you loaned to Dan, The Tire Man?

A. Yes, sir.

Q. So that you knew about the transaction?

A. Yes, sir.

Q. How do you explain this order of March 16th, or letter signed by a man you don't know, Bob Hastings, being in the transaction which you financed the man who got the tires by lending him cash?

A. Yes, sir—

Q. And concerning which you later wrote a confirmatory letter?

A. That is right.

Q. And still you don't know anything about Hastings?

A. No, sir, absolutely not. I never saw that (indicating) or that bill in my life before. (Indicating.)

(This Exhibit, page 31.)

Q. Had you written any order or letter in connection with this transaction before you wrote your confirmatory letter?

A. No, sir, absolutely.

Q. Just by mere strange coincidence a man by the name of Hastings—

A. No strange coincidence at all. They told me that the tires were delivered and asked me to sign this, which I did.

Q. And you knew about it on March 16th?

A. Yes, sir, I knew they were going to—

Q. You knew that they had bought these on March 16th?

A. Yes, sir.

Q. And you knew that you were to be the purchaser?

A. That is right.

Q. And you knew you were to loan the money for it?

A. That is right.

Q. But you don't know anything about this letter signed by Hastings?

A. No.

THE COURT: All right.

By Mr. Curtis:

Q. This money that you furnished Dan, The Tire Man, is that the only one that you financed?

(This Exhibit, page 32.)

Mr. Zion: That is going far afield, your Honor.

Mr. Curtis: It is on the question of credibility.

The Witness: What is the question?

Starting testimony read into record at 135a.

"A. (N. T. pp. 19-22 inc.)

By Mr. Curtis:

Q. Is that the only transaction you financed for Dan, The Tire Man?

A. No.

Q. With respect to this particular transaction for these tires in question, you gave the money to Dan, The Tire Man, to finance?

A. That is right.

Q. You are positive of that?

A. Yes, sir, that is right.

Q. You are sure of that?

A. Yes.

Q. I show you what I have marked for identification Government's Exhibit 9—

(Statement dated June 16, 1942, was marked Government's Exhibit 9 for identification.)

Mr. Curtis: Don't read it all—just the second paragraph (indicating.)

Mr. Zion: I have the right to look it over.

(This Exhibit, page 33.)

The Court: Is there anything on the second page?

Mr. Curtis: There are two or three pages, but I am only interested in the second paragraph at this time.

Mr. Zion: All right.

By **Mr. Curtin**:

Q. And ask you if this is your signature on Government's Exhibit 9?

The Court: What is 9 that you are showing him?

Mr. Curtin: A statement made by the defendant himself.

The Witness: Yes, that is my signature.

By **Mr. Curtin**:

Q. That is your statement, is it not?

The Court: Is that to the OPA?

Mr. Curtin: Yes, sir, your Honor.

By **Mr. Curtin**:

Q. I will strike that. I will word it this way: That is a statement made by you, is it not?

By **The Court**:

Q. And signed by him?

(This Exhibit, page 34.)

A. Yes, that is right.

By **Mr. Curtin**:

Q. What is the date of that statement?

A. June 16, 1942.

Q. June 16, 1942. In this statement, would you mind reading the second paragraph only?

A. (Reading) "I supplied $2,750.00 to Ellwood T. Evans and Mr. Sweeney for the purchase of tires on a date I do not recall."

Q. As a matter of fact, you never gave this money to Dan, The Tire Man?

A. I didn't hand it to him direct.

Q. You gave it to Evans and a man named Sweeney, as stated in that statement?

A. That is right, sure.

By **The Court**:

Q. That $2,750.00, did that have any relation to the transaction with Dan, The Tire Man?

A That is right. See, Mr. Sweeney, the manager for the United Petroleum Corporation, was very friendly with Dan, The Tire Man; in fact, Dan, The Tire Man, used to buy all the tires from the United Petroleum because they had a special price, and this money was given to Mr. Evans to give to Dan for the purpose of buying tires."

Ending testimony read into record at 135a.

(This Exhibit, page 35.)

Q. Why did you give the money to Sweeney?

A. He was the one who made the transaction for the United Petroleum Corporation.

Q. Why didn't they sell the tires to Dan, The Tire Man?

A. No,—I couldn't say. He could of bought them direct if he had money.

Q. Somebody came to you and said, "Won't you finance this transaction?" Did it occur to you why Dan couldn't buy them direct?

A. He wanted me to buy them, and I didn't want them. Dan was in my office, and he said he would like to have them.

Q. Why didn't you tell Dan to transact the purchase of the tires direct?

A. He didn't have the money.

Q. Why could you not lend him the money to buy them under his own name?

A. He could have done it.

Q. Why didn't you?

A. Dan is a dealer, and if I remember under the ration regulations—

Q. I don't care about the ration regulations. It was

(This Exhibit, page 36.)

a simple transaction,—somebody came to you and said that they wanted to buy tires?

A. Yes, sir.

Q. And "will you lend me the money"? Is that what happened?—he said, "I want to buy these tires"?

A. Yes. But he couldn't buy them from the United at the same price. Dan Roche is a dealer and not a distributor. I could purchase them as a distributor, and that is the reason for that order. He was a dealer.

Q. Dan could not have bought them?

A. No, Dan could not have bought them.

Q. Because that was a violation of the regulations of the OPA, is that right?

A. That is right, he could have sold them if Dan Roche was a—nobody quite understood the regulations,—but I could buy them.

Q. You said that Dan couldn't buy them, a half minute ago?

A. That is my interpretation that he couldn't.

Q. The reason that this transaction took place in the manner in which it did was because at the time you as a dealer could buy tires?

A. As distributor.

(This Exhibit, page 37.)

Q. And Dan could not?

A. That is right.

Q. Wasn't that a violation of the OPA regulations?

A. I wouldn't say it was a violation.

Q. He couldn't do it under the OPA?

A. That is right.

Q. So that you had to help or assist him to circumvent the OPA?

A. It wasn't circumventing the OPA; he could buy them from me and sell them.

Q. But he couldn't buy them direct from the company?

A. Nobody could answer that at that particular time—I don't know.

The Court: All right, anything else?

Mr. Curtin: Just one more thing.

The Court: I want to ask a dozen more, but I want to eat, and this jury wants to eat.

Mr. Curtin: All right, I beg your pardon.

The Court: All right, we will recess until 2:00 o'clock.

* * * * * * * *

* * * * * * * *

(Recess from 12:50 to 2:05 P. M.)

(This Exhibit, page 38.)

AFTER RECESS.

(Counsel as heretofore noted.)

Lee F. Weiler, recalled:

Cross-examination (Continued).

The Court: Proceed, Mr. Curtin.

By Mr. Curtin:

Q. Now, Mr. Weiler, would you know the Notary Public if you saw him?

A. I don't believe I would.

Mr. Curtin: Mr. Oates, will you stand up?

(Rises.)

By Mr. Curtin:

Q. Do you recognize that gentleman?

A: Yes, yes.

Q. Do you recognize who he is?

A. No, I couldn't place him; I have seen him before.

By The Court:

Q. Where did you see him before?

A. I believe he is the Notary from the United Petroleum Company.

Q. After you look at him, does that refresh your memory?

(This Exhibit, page 39.)

A. Yes.

Q. And what is your memory as refreshed now?

A. That he is the gentleman who asked me to sign it and put the seal on it.

Q. And, you did take an affidavit, now?

A. Yes, sir.

Q. You are sure about that?

A. I never said I didn't. I signed it and took an affidavit.

Q. You said before that you were not sure.

A. This man was the man who was there, and I know him now.

Q. Now you know that you did swear to it that you had purchased the tires?

A. That is right, yes, sir.

The Court: All right.

* * * * * * * *

* * * * * * * *

Mr. Zion: At this time, I move to strike out all of the evidence that was produced with reference to the transaction with the United Petroleum or whatever that name is, as having no connection with the transaction with which he is charged in this indictment.

(This Exhibit, page 40.)

Mr. Curtin: That testimony was not produced to show any particular transaction but merely to attack the credibility of the witness in answer to the questions.

The Court: I will deny your motion to strike, and exception will be noted.

By The Court:

Q. When you gave this $2,750.00 to Evans and Sweeney, about when was that?

A. The 16th of March, I believe.

Q. The 16th of March,—don't you know?

A. Pardon me,—I didn't give it to Sweeney; I left it with Evans.

Q. And what about the balance, the other $1,500.00?

A. They had a number of tires which they were trying to sell to me; I didn't know the exact number of tires, and that is why I left that amount.

Q. And that is on March 16th?

A. Yes, sir. I never knew how many tires they had until the United came over eight days later and asked me to sign this paper,—which this gentleman (indicating) can testify I did. The United never gave me a bill because I never bought anything from them.

(This Exhibit, page 41.)

Q. Are you still Chairman of the Ration Board?

A. No, sir. I went in and talked to Mr. Coffey whether he thought it would be a reflection on the Board, and he said it would, and I resigned.

Q. I didn't want that answer, but having answered it that way, I—

A. I believe I served six or seven months.

* * * * * * * *

* * * * * * * *

Reported by
H. A. B. Schwartz.

GOVERNMENT'S EXHIBIT NO. 3.

(Cut of NRA Symbol)

Expert Repairing Ronson 100% Penna. Oil
BREWERYTOWN GARAGE
S. E. Cor. 31st & Thompson Sts.

Philadelphia, Pa. March 16th, 1942.

United Petroleum Corp.,
Bryn Mawr & Wynnefield Aves.,
Philadelphia, Pa.

Gentlemen:

Please accept our order for
150 6.00-16 Firestone Standard Tires
20 6.25/6.50-16 Firestone Standard Tires, at current dealer billing, less 15% and 2% cash.

Yours very truly,
BREWERYTOWN GARAGE
Bob Hastings

GOVERNMENT'S EXHIBIT NO. 4.

Phone Race-3784 Phone Pop 9027
LEE F. WEILER
31st and Thompson Streets
Philadelphia, Pa.
(Cut of Tire) Bonded Cooper Tires

March 24, 1942

United Petroleum Corporation,
2227 Bryn Mawr Ave.,
Phila., Pa.

Gentlemen:

We are wholesalers of tires under the meaning of the Tire Rationing Regulation Act as amended February 19, 1942. We are therefore entitled to buy new tires and tubes from a distributor under the meaning of the Act.

In as much as you are a distributor we have purchased from you 150 600x16 Standard and Convoy tires and 20 625-50x16 Standard Tires under date of March 16.

We are writing this letter as per your request.

Very truly yours
Lee F. Weiler
Lee F. Weiler
Brewerytown Garage

Subscribed and Sworn to before
me this 24th day of March 1942.
JOHN F. OATES
(Seal) *Notary Public*
My Commission Expires February 17, 1948.

GOVERNMENT'S EXHIBIT NO. 5.

UNITED PETROLEUM CORPORATION
Wynnefield and Bryn Mawr Avenues
Philadelphia, Pa.

Sold to
Brewerytown Garage
31st & Thompson

Date Mar 16, 42

Terms

Receipt No.	Products	Price	Amount	Total
	150—600-16 Standard & Convoy Tires	7.37	1105.50	
	20—625-650-16 Standard Tires	9.00	180.00	
			1285.50	
	Less 15		192.82	
			1092.68	
	Less 2		21.85	
			1070.83	
	Federal Tax		177.90	
			1248.73	

500.— **Paid**
500.— **BBS.**
248.73
——
1248.73

GOVERNMENT'S EXHIBIT NO. 6.

Name
Thirty first and Thompson St.
Brewerytown Garage
Berks Street
David
Brill
Bob
Hastings
O Brien
O Hunry
Lee F. Weiler

DEFENDANT'S EXHIBIT NO. 1.

George Washington
Harrisburg
Bob Evans
Baltimore
Hastily yours
Hastings
Bob Hastings
Bob Evans

DEFENDANT'S EXHIBIT NO. 2.

Bob Hastings
Bobcat
Tidings

Rings
Haddonfield
Dan Roatche

ORDER SEALING BILL OF EXCEPTIONS.

And Thereupon, the counsel for the said defendant did then and there except to the refusal of the Trial Judge to the aforesaid point for charge presented by the defendant and the charge and opinion of the said Court, and the said jury rendered their verdict in favor of the United States and against the defendant, and afterwards, to wit, on the 2nd day of October, A. D. 1943, the defendant moved the said Court for a new trial (prout Motion), and afterwards, to wit, on the 8th day of October, A. D. 1943, the said Court, by the said Honorable T. Blake Kennedy, Judge, did orally in open Court deny the Motion for new trial and directed judgment to be entered in favor of the United States and against the defendant on the verdict of the said jury and the whole record, (prout opinion and judgment order) and afterwards, to wit, on the 8th day of October, A. D. 1943, the defendant, by its counsel, requested and was granted an Exception to the action of the Court in directing judgment to be entered upon the verdict of the jury and upon the whole record, and inasmuch as the said rulings, charge and opinion so excepted to do not appear on the record:

The said counsel for the said defendant did then and there tender this Bill of Exceptions to the rulings, charge opinion and action of the said Court, and requested the seal of the Judge aforesaid should be put to the same, according to the form of the statute in such case made and provided.

And, Thereupon, the aforesaid Judge at the request of said counsel for the defendant, did put his seal to this Bill of Exceptions, pursuant to the aforesaid statute in such case made and provided, this 9 day of October, A. D. 1943.

/s/ T. Blake Kennedy,
Judge.

Approved as to Form
/s/ Thomas J. Curtin
Attorney for United States.

MOTION FOR NEW TRIAL.

Now, October 2, 1943, comes Lee F. Weiler, the defendant in the above entitled case, and moves the Court to grant him a new trial for the following reasons, to wit:

1. The verdict of the jury was contrary to the law and the evidence.

2. The verdict of the jury was contrary to the weight of the evidence.

3. The verdict of the jury was contrary to the charge of the court.

4. The evidence fails to establish that the defendant, Lee F. Weiler, committed an offense against the United States.

5. That the admission of evidence over objection of counsel for the defendant affected the substantial right of the defendant and was prejudicial to the defendant.

6. That the Learned Trial Judge erred in his charge to the jury.

7. The Learned Trial Judge erred in refusing defendant's requests to charge the jury, as follows:

"1. That from the beginning of the trial, until

5

the end, the District Attorney has the burden of establishing beyond a reasonable doubt, every fact essential to the conviction of the defendant; the defendant has no burden to sustain; it is enough that his evidence, taken with the Government's, raises a reasonable doubt as to his guilt, in which case he must be acquitted."

8. The Learned Trial Judge erred in refusing defendant's request to charge the jury, as follows:

> "2. That the defendant is presumed to be innocent, and this presumption continues throughout the trial and during the deliberations of the jury, and is overcome when, and only when, their guilt is established beyond a reasonable doubt."

9. The Learned Trial Judge erred in refusing defendant's request to charge the jury, as follows:

> "3. In order to convict this defendant of perjury, the Government must produce testimony of a more direct and positive character, than is required to justify a verdict of guilty of other offenses.
>
> Hart vs. United States, 131 F. 2d 59;
> United States vs. Buckner, 118 F. (2d) 468;
> Cohen vs. United States, 27 F. (2d) 712."

10. The Learned Trial Judge erred in refusing defendant's request to charge the jury, as follows:

> "4. The Government's evidence must be clear, convincing and direct. Not only must you be satisfied of defendant's guilt beyond a reasonable doubt, but the Government must prove the falsity of the matter sworn to by him, by direct and positive evidence. Unless you are so satisfied, then you must find defendant not guilty.
>
> Clayton vs. United States, 284 F. 537."

11. The Learned Trial Judge erred in refusing defendant's request to charge the jury, as follows:

> "5. An oath not required to be administered by any law or rule of court, even though false, is not perjury, although administered under the usage of an administerial officer.
>
> United States vs. Babcock, Fed. Case No. 14,488."

12. The Learned Trial Judge erred in refusing defendant's request to charge the jury, as follows:

> "6. I direct you that an oath taken by this defendant to any letter, order or other writing, even though administered by a Notary Public duly authorized to administer oaths, when not required to be administered by any law or rule of court, is not perjury even though false."

13. The Learned Trial Judge erred in refusing defendant's request to charge the jury, as follows:

> "7. (a) In a prosecution of perjury, there is a strong presumption of innocence, and therefore, credit must be given to what the defendant may have said under oath rather than to what he may have said to the contrary when not under oath.
>
> 7. (b) If you find that the defendant made oath to contradictory statements, you may not convict the defendant of perjury unless the Government can show that he deliberately made oath to a statement which was false and which of those statements were false."

14. The Learned Trial Judge erred in refusing defendant's request to charge the jury, as follows:

> "8. The Government must establish the falsity of the statement alleged to have been made by the defendant under oath, by the testimony of two indepen-

dent witnesses or one witness and corroborating circumstances. Unless that has been done, you must find defendant not guilty."

15. The Learned Trial Judge erred in refusing defendant's request to charge the jury, as follows:

> "9. (a) Whenever a circumstance relied on as evidence of criminal action, is susceptible of two inferences, one of which is in favor of innocence, such circumstance is robbed of all probative value, even though from the other inference, guilt may be fairly deducible.
>
> 9 (b) Therefore, if you find that the acts and circumstances relied on by the Government to sustain the charge of guilt of the defendant, is susceptible of an inference of innocence, then you must find the defendant not guilty as charged."

16. The Learned Trial Judge erred in refusing defendant's request to charge the jury, as follows:

> "10. If after you have retired, there arises a disagreement between you as to any part of the testimony, or if you desire to be informed of a point of law arising in the case, you must ask to be brought back into the Court and the information will then be given to you."

17. The Learned Trial Judge erred in refusing defendant's request to charge the jury, as follows:

> "11. Under all the evidence presented in this case, your verdict must be for the defendant."

18. Additional reasons in support of this Motion will be filed upon the transcription of the Notes of Testimony of this trial.

Peter P. Zion,
Attorney for Defendant.

ADDITIONAL REASONS IN SUPPORT OF DEFENDANT'S MOTION FOR A NEW TRIAL.

19. The Learned Trial Judge erred in overruling defendant's objection to the admission of evidence as follows:

N. T. pages 4 to 6.

Mr. Curtin: I desire to offer this in evidence as Government's Exhibit 2.

Mr. Zion: At this point I object to the offer, sir, unless they offer in evidence the entire testimony by this witness or that that is the entire testimony of this witness. This is a selected portion of the testimony; it is not all the testimony.

The Court: You can offer it if you want to, if there is any other testimony which you desire to call attention to.

Mr. Zion: I think, sir, it would be the burden of the Government to produce the testimony of this witness taken at the time of the other trial, that they cannot just select certain portions and offer them in evidence as the record.

The Court: They don't offer it in evidence as the record; they offer it in evidence as that portion of the record in which they contend that he testified falsely.

Mr. Zion: To that extent that is correct, sir, but they cannot, in my opinion, submit that as the record of the man's testimony unless they have all of his testimony.

The Court: You have the right to offer additional testimony if you want to. It does not put any additional burden on you, because it is a part of cross-examination.

Mr. Zion: I feel, sir, it is their burden.

The Court: I agree with you that it is their burden, but I don't think they have to introduce the entire record in this case.

Mr. Zion: The only reason I raise that point, sir, is because only certain parts were written up. There are other parts of which I have no record. We would have to burden the stenographer to read the whole thing, which I don't want to do, but I don't think it is fair to the defendant to have only certain things put in. There may have been other things said that are inconsistent with the charge.

The Court: We don't know about that. You can bring it out on cross-examination. If it takes a week, we will spend a week to let you present your case. The objection is overruled.

Mr. Zion: Exception. I understand exceptions are automatic.

The Court: They are. It is the rule in my district; I assume it is here.

20. The Learned Trial Judge erred in overruling defendant's objection to strike out testimony as follows:

N. T. page 9.

Mr. Zion: I wish to make a motion now, sir, although I don't expect the Court to rule on it. I will ask the Court to permit me to make a motion. I move to strike out the testimony that was read at this time because it does not appear on its face that it is material to the issue.

The Court: It gives a history of the transaction. Your objection will be overruled.

21. The Learned Trial Judge erred in overruling defendant's objection to strike out testimony as follows:

N. T. pages 22, 23 and 24.

Mr. Zion: If the Court please, I move here also that this testimony be stricken out because it shows on its face it is not material to the issue that was before the Court in the former case. In that former case, sir, the indictment alleged certain transactions, the last date of which was January 20, 1942. At the time that this testimony was given the Court had already directed a verdict of not guilty as to the third and fourth counts as to this defendant, which touched on the transaction of January 20, 1942, and all this testimony about which this witness has read, which was given by Mr. Weiler in the other case, had to do with the transaction of March, 1942, some two months after or a month and a half after the last date averred or alleged in the indictment; and, as a matter of fact, as to Counts 1 and 2, the only date given there was, I think, December, 1941, and it is clearly not material to the issue.

The Court: What was the charge in this indictment?

Mr. Zion: The original indictment, sir, was a charge with conspiracy, first, to have a false report or record be given to the agency of the Government, the OPA, which had to do with a bill which they allege was dated December 10, 1941, by the defendants; whereas, as a matter of fact, the sale was December 20, which would bring it after December 10, and also conspiracy arising out of that, that they should transfer tires in violation of this regulation and also they should not make the return required to be made of your inventory that you had on hand on a certain date—I think it was December 10, 1941—which had to be filed not later than December 31, 1941. The other two counts are out of the case. They had to do with a transaction with a man named Moss on an alleged purchase of tires on January 20, 1942. Those two were dropped out of the case by the direction of the Court before the defense went on; therefore, when Mr. Weiler testified the only issue before the Court, before the jury to pass upon, had to do with what I call the Farbstein transaction and the filing of that report; and since all this testimony relates to something that took place after that date— it was March 16, 1942—it certainly could not be material to the issue. It wasn't even before the Court.

The Court: I think it was relevant to the issue that was being investigated at that time on the trial.

Mr. Zion: May it please the Court, this was an indictment. The investigation was over.

The Court: I mean the trial, of course.

Mr. Curtin: How about his own credibility if your Honor please? My friend thinks that the jury was to believe anything. Credibility is a big thing.

The Court: The motion is denied.

22. The Learned Trial Judge erred in sustaining the Government's objection as follows:

N. T. pages 25-6.

Q. Are you able to state whether or not, up to the time of the close of the Government case in that matter there had been any evidence introduced by the Government showing any transaction that took place later than January 20, 1942?

Mr. Curtin: That is objected to. The Court has already passed upon the materiality.

The Court: The objection is sustained.

23. The Learned Trial Judge erred in sustaining the Government's objection as follows:

N. T. pages 31-2.

Q. That is all at that point. Now, turn to page 39, the statement at the bottom of the page, by Mr. Zion.

Mr. Curtin: If your Honor please—

Mr. Zion: I wish to show, sir, that at that time I moved to strike that testimony because it was irrelevant.

Mr. Curtin: I submit, if your Honor, please, what motion Mr. Zion made at the previous trial has nothing to do with the perjury charge here.

The Court: That has nothing to do with it.

Mr. Zion: In other words, he objects to the question—

The Court: You are reading something in the way of a motion in the record. That wasn't anything in the way of testimony.

Mr. Zion: To show, sir, the basis upon which that testimony was put in: to show, sir, that at that time Mr. Curtin did not put it in as being material to the issue of the indictment, merely on the question, as he called it then, of credibility, to sustain our position that it was not material to the issue of the charge in that indictment. This was a matter that look place after the last date of the indictment and after any date set forth in the testimony put forth by the Government.

The Court: The objection is sustained.

24. The Learned Trial Judge erred in overruling defendant's motion, as follows:

N. T. pages 33-4.

Mr. Zion: If the Court please, you have already ruled that I could not ask this witness, who is a court stenographer, as to whether or not at the last trial in the Government case they had produced any evidence whatever to show any transaction after January 20, 1942. That forces me to make a motion I didn't want to make. I, therefore, ask that there be offered in evidence all of the testimony of the Government in their case in chief in the other case, for the purpose of showing that there was not in issue any transaction that took place after January 20, 1942.

The Court: The motion is denied. That is part of the defense if you wish to show it.

Mr. Zion: Of course, sir, that offer will come in my defense, but I wanted it here because of the objection of the United States Attorney when I asked a question of this witness. We could have saved all that examination and all that effort, because he had read through the notes and could answer. It would save a great deal of time, sir, if you would permit me to say that there was no such testimony or that there was.

The Court: I know, but you are quarreling with the rules of evidence.

Mr. Zion: I am not quarreling with the rules.

The Court: Yes, you are. You claim that he should not have objected.

Mr. Zion: I say it is material in this case to show whether or not it was material in the other case.

25. The Learned Trial Judge erred in overruling defendant's objection as follows:

N. T. pages 38-9.

Q. Is that the duplicate bill head that you used in March, 1942?

Mr. Zion: I object, sir, to the question. It is certainly not material. He may testify if he prepared this bill or it was done under his supervision. He certainly can't testify nor is it material whether it was a duplicate bill that they used in their business or not.

The Court: Overruled.

26. The Learned Trial Judge erred in overruling defendant's objection as follows:

N. T. page 45.

Q. With respect to this particular transaction, did you know or was anything ever said to you that anybody else but Mr. Weiler was purchasing these tires at any time?

Mr. Zion: I object to that, sir. It is not proper re-direct-examination nor is it material.

The Court: The objection is overruled. He can recall him for that purpose. You may answer.

A. No, nothing like that was ever said. The transaction was supposed to be with Mr. Weiler.

27. The Learned Trial Judge erred in overruling defendant's objection to the admission in evidence as follows:

N. T. page 47.

Mr. Curtin: With your Honor's permission, I would like to offer this in evidence.

Mr. Zion: Will you note my objection, sir, on the ground of lack of materiality, because on the other, also, he admitted signing that paper and admitted taking affidavits, so it is not material here.

The Court: It takes in the whole picture.

Mr. Zion: Anyhow, note my objection, sir.

28. The Learned Trial Judge erred in overruling objection as follows:

N. T. pages 48-9.

Q. At the particular time when you took that affidavit, was anything said to you, as office manager, about this purchase being for the account of somebody else?

A. No.

Mr. Zion: Objected to. There is no evidence here by anybody it was so stated.

29. The Learned Trial Judge erred in overruling defendant's objection to the admission in evidence as follows:

N. T. pages 50-1.

Mr. Curtin: I ask permission to offer this particular exhibit in evidence.

Mr. Zion: I object, sir, because it has not been properly proven. There is no one here who has testified that such a sale was made. He has merely testiified the practice in his office was to have such a bill.

By the Court:

Q. Is this bill a part of the official records of your company?

A. Yes, sir.

The Court: The objection is overruled.

30. The Learned Trial Judge erred in overruling objection to the admission in evidence as follows:

N. T. page 51.

Mr. Zion: Note my objection also, sir, to the reading of the bill, which is consistent with the other objection.

31. The Learned Trial Judge erred in overruling objection to the admission in evidence as follows:

N. T. page 54.

Mr. Zion: I renew my objection to the introduction in evidence of that bill.

The Court: Overruled. It is admissible as a part of the office records.

32. The Learned Trial Judge erred in overruling objection as follows:

N. T. page 79.

Q. You went down to the Navy Yard—

Mr. Zion: I object to this type of examination; it is certainly not proper.

The Court: You opened it up by asking him how long after the time. That has a suggestion to it.

The Witness: I would like to answer it.

Mr. Curtin: That is the reason, if your Honor please. If there is any inference between the two jobs—

Mr. Zion: I didn't intend to make any such inference at the time, sir. I object to this line of examination.

The Court: It might have that sort of inference, so I am permitting him to re-examine him on the proposition.

Mr. Zion: Note my objection, sir, and you overrule the objection?

The Court: Yes.

33. The Learned Trial Judge erred in overruling defendant for motion to strike evidence in record and for withdrawal of a juror, as follows:

N. T. page 80.

Mr. Zion: I ask that that be stricken from the record, and I ask for the withdrawal of a juror because of that statement.

The Court: The motion is denied. You opened the door yourself by asking him how long after he left this company he took another job.

34. The Learned Trial Judge erred in overruling defendant's objection as follows:

N. T. pages 92, 95a, 131 and 132.

Mr. Zion: If the Court please, I move now for a directed verdict and would like to argue before the Court, not in the presence of the jury. I see it is now 4:10 anyhow, sir.

The Court: Well, let him explain further. The motion is overruled.

Mr. Zion: If the Court please, I ask leave to renew my motion for a directed verdict for the defendant.

The Court: Overruled.

35. The Learned Trial Judge erred in overruling defendant's objection as follows:

N. T. page 124.

Q. Even if you filed one in December, 1942, if you had transactions in tires after December—January, February or March—you would have to file a second P. D.-216, would you not?

Mr. Zion: I object to that. The indictment does not charge that.

The Court: Overruled.

36. The Learned Trial Judge erred in his charge to the jury as follows:

N. T. page 135-6 and page 141.

That was a judicial proceeding, and I so charge you, and the matter testified to in that proceeding by the defendant was material to the investigation being made at that time in that trial, which leaves for your determination, as members of the jury, whether or not any false testimony given by the defendant was wilfully done, and whether or not in part the evidence which he gave at that time was false, and knowingly and wilfully false, known to him to be false, and given with the intent to deceive the Court and the jury in that case.

Mr. Zion: Will you note these exceptions. I take exception only to that part of your charge, sir, where you said that you will direct that the matter was material to the issues.

37. The Learned Trial Judge erred in his charge to the jury as follows:

N. T. pages 136 and 141.

I have charged you that the testimony given upon that trial was material to the inquiry then being conducted, because it was admitted in evidence by the trial court there, and in addition it tended to test the credibility of the defendant who was a witness in his own behalf in that case, and in addition it was testimony given in regard to some transactions which were being inquired into under the counts which were submitted to the jury in that case.

Mr. Zion: Will you note these exceptions. I take exception only to that part of your charge, sir, where you said that you will direct that the matter was material to the issues.

The Court: You may have an exception to that.

Peter P. Zion,
Attorney for Defendant.

MOTION IN ARREST OF JUDGMENT.

NOW, October 2, 1943, comes Lee F. Weiler, defendant in the above entitled cause and moves that the verdict of guilty returned against him by a jury in this Court on the 29th day of September, A. D. 1943, be arrested and no judgment and sentence be imposed thereon for the following reasons:

1. That the Indictment upon which the defendant was tried and convicted does not state facts sufficient to constitute a crime against the United States.

2. That the evidence offered by the Government of the offense alleged in said Indictment does not support and sustain the charge that an offense has been committed against the United States.

3. That the Indictment upon which the defendant was tried and convicted does not state facts which constitute a violation of any statute of the United States.

4. That the evidence produced by the Government does not prove sufficient facts to constitute an offense under any statute of the United States.

5. The averments of the Indictment and the evidence produced by the Government fail to sustain the violation of any punishable offense lawfully created by an Act of Congress.

6. The defendant reserves the right to file additional reasons in support of this Motion as soon as the notes of testimony have been transcribed and a Bill of Exceptions has been allowed and filed in this Court.

Peter P. Zion,
Attorney for Defendant.

JUDGMENT AND COMMITMENT.

(Filed October 8, 1943.)

On this 8th day of October, 1943, came the United States Attorney, and the defendant Lee F. Weiler appearing in proper person, and by counsel and,

The defendant having been convicted on verdict of Guilty of the offense charged in the indictment in the above-entitled cause, to wit Perjury and the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, It Is by the Court

Ordered and Adjudged that the defendant, having been found guilty of said offenses, is hereby committed to the custody of the Attorney General for imprisonment in an institution of the Penitentiary type to be designated by the Attorney General or his authorized representative for the period of ONE (1) YEAR and ONE (1) DAY and that said defendant be imprisoned until said defendant is otherwise discharged as provided by law.

It is Further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

(Signed) T. Blake Kennedy,
United States District Judge.

A True Copy. Certified this day of

(Signed)................: *(By)* ....

Clerk. *Deputy Clerk.*

DESIGNATION OF CONTENTS OF RECORD ON APPEAL.

To the Clerk of the District Court:

The record on appeal of the above described matter shall contain the following listed original pleadings, papers, testimony and findings:

1. Docket Entries.

2. Indictment.

3. Arraignment and Plea.

4. Bill of Exceptions.

5. Complete stenographic record of proceedings and evidence, (notes of testimony, pages 1 to 147 inclusive).

6. Original exhibits offered in evidence as follows:

Government's Exhibit No. 1
Indictment in the case of U. S. A. vs. Lee F. Weiler and Ellwood T. Evans, No. 10,694, December Sessions, 1942.

Government's Exhibit No. 2
Notes of Testimony in the case of U. S. A. v. Lee F. Weiler and Ellwood T. Evans, No. 10,694, December Sessions, 1942.

Government's Exhibit No. 3
Letter dated March 16, 1942 on Letterhead of Brewerytown Garage, signed "Bob Hastings" addressed to United Petroleum Corporation.

Government's Exhibit No. 4
Letter dated March 24, 1942, signed by Lee F. Weiler, addressed to United Petroleum Corporation.

Government's Exhibit No. 5

Paper dated March 16, 1942, on billhead of United Petroleum Corporation.

Government's Exhibit No. 6

Paper containing specimen of handwriting of E. T. Evans.

Defendant's Exhibit No. 1

Paper containing specimens of handwriting of witness Roatche.

Defendant's Exhibit No. 2

Paper containing specimens of handwriting of witness Roatche.

7. Defendant's Motion for a New Trial.

8. Additional reasons in support of Defendant's Motion for a New Trial.

9. Defendant's Motion in Arrest of Judgment.

10. Judgment and Commitment.

11. Notice of Appeal to Circuit Court of Appeals.

12. Assignments of Error.

Peter P. Zion,
Attorney for Defendant.

ASSIGNMENTS OF ERROR.

AND NOW, to wit, this 3rd day of November, A. D. 1943, the defendant above named, by PETER P. ZION, ESQ., his attorney, assigns the following errors:

1. The Learned Trial Judge erred in dismissing defendant's Motion for a New Trial.

2. The Learned Trial Judge erred in dismissing defendant's Motion in Arrest of Judgment.

3. The Learned Trial Judge erred in overruling defendant's objection to the admission in evidence as follows:

N. T. pages 4 to 6.

Mr. Curtis: I desire to offer this in evidence as Government's Exhibit 2.

Mr. Zion: At this point I object to the offer, sir, unless they offer in evidence the entire testimony by this witness or that that is the entire testimony of this witness. This is a selected portion of the testimony; it is not all the testimony.

The Court: You can offer it if you want to, if there is any other testimony which you desire to call attention to.

Mr. Zion: I think, sir, it would be the burden of the Government to produce the testimony of this witness taken at the time of the other trial, that they cannot just select certain portions and offer them in evidence as the record.

The Court: They don't offer it in evidence as the record; they offer it in evidence as that portion of the record in which they contend that he testified falsely.

Mr. Zion: To that extent that is correct, sir, but they cannot, in my opinion, submit that as the record of the man's testimony unless they have all of his testimony.

The Court: You have the right offer additional testimony if you want to. It does not put any additional burden on you, because it is a part of cross-examination.

Mr. Zion: I feel, sir, it is their burden.

The Court: I agree with you that it is their burden, but I don't think they have to introduce the entire record in this case.

Mr. Zion: The only reason I raise that point, sir, is because only certain parts were written up. There are other parts of which I have no record. We would have to burden the stenographer to read the whole thing, which I don't want to do, but I don't think it is fair to the defendant to have only certain things put in. There may have been other things said that are inconsistent with the charge.

The Court: We don't know about that. You can bring it out on cross-examination. If it takes a week, we will spend a week to let you present your case. The objection is overruled.

Mr. Zion: Exception. I understand exceptions are automatic.

The Court: They are. It is the rule in my district; I assume it is here.

NOTE:

The Exhibit which was admitted, consisted of but a portion of the testimony of Lee F. Weiler at the trial of United States of America vs. Lee F. Weiler and Ellwood T. Evans, of No. 10694, December Sessions, 1942, in the United States District Court for the Eastern District of Pennsylvania.

4. The Learned Trial Judge erred in overruling defendant's objection to strike out testimony, as follows:

N. T. page 9.

Mr. Zion: I wish to make a motion now sir, although I don't expect the Court to rule on it. I will ask the Court to permit me to make a motion. I move to strike out the testimony that was read at this time because it does not appear on its face that it is material to the issue.

THE COURT: It gives a history of the transaction. Your objection will be overruled.

NOTE:

This motion was to strike out those portians of Government Exhibit No. 2 which were read into the record after the Court had overruled defendant's objection to its offer in evidence by the Government.

5. The Learned Trial Judge erred in overruling defendant's objection to strike out testimony as follows:

N. T. pages 22, 23 and 24.

MR. ZION: If the Court please, I move here also that this testimony be stricken out because it shows on its face it is not material to the issue that was before the Court in the former case. In that former case, sir, the indictment alleged certain transactions, the last date of which was January 20, 1942. At the time that this testimony was given the Court had already directed a verdict of not guilty as to the third and fourth counts as to this defendant, which touched on the transaction of January 20, 1942, and all this testimony about which this witness has read, which was given by Mr. Weiler in the other case, had to do with the transaction of March, 1942, some two months after or a month and a half after the last date averred or alleged in the indictment; and, as a matter of fact, as to Counts 1 and 2, the only date given there was, I think, December, 1941, and it is clearly not material to the issue.

THE COURT: What was the charge in this indictment?

MR. ZION: The original indictment, sir, was a charge with conspiracy, first, to have a false report or record be given to the agency of the Government, the OPA, which had to do with a bill which they allege was dated December 10, 1941, by the defendants; whereas, as a matter of fact, the sale was December 20, which would bring it after December 10, and also conspiracy arising out of that, that they should transfer tires in violation of this regulation and also they should not make the return required to be made of your inventory that you had on hand on a certain date—I think it was December 10, 1941—which had to be filed not later than December 31, 1941. The other two counts are out of the case. They had to do with a transaction with a man named Moss on the alleged purchase of tires on January 20, 1942. Those two were dropped out of the case by the direction of the Court before the defense went on; therefore, when Mr. Weiler testified the only issue before the Court, before the Jury to pass upon, had to do with what I call the Farbstein transaction and the filing of the report; and since all this testimony relates to something that took place after that date—it was March 16, 1942—it certainly could not be material to the issue. It wasn't even before the Court.

The Court: I think it was relevant to the issue that was being investigated at that time on the trial.

Mr. Zion: May it please the Court, this was an indictment. The investigation was over.

The Court: I mean the trial, of course.

Mr. Curtin: How about his own credibility, if your Honor please? My friend thinks that the Jury was to believe anything. Credibility is a big thing.

The Court: The Motion is denied.

NOTE:

This motion was to strike out those portions of Government Exhibit No. 2 which were read into the record after the Court had overruled defendant's objection to its offer in evidence by the Government.

6. The Learned Trial Judge erred in sustaining the Government's objection to the admission of evidence as follows:

N. T. pages 25-6.

Q. Are you able to state whether or not, up to the time of the close of the Government case in that matter, there had been any evidence introduced by the Government showing any transaction that took place later than January 20, 1942?

Mr. Curtin: That is objected to. The Court has already passed upon the materiality.

The Court: The objection is sustained.

7. The Learned Trial Judge erred in sustaining the Government's objection to the admission of evidence as follows:

N. T. pages 31-2.

Q. That is all at that point. Now, turn to page 39, the statement at the bottom of the page, by Mr. Zion.

Mr. Curtin: If your Honor please—

Mr. Zion: I wish to show, sir, that at that time I moved to strike that testimony because it was irrelevant.

Mr. Curtin: I submit, if your Honor, please, what motion Mr. Zion made at the previous trial has nothing to do with the perjury charge here.

The Court: That has nothing to do with it.

Mr. Zion: In other words, he objects to the question—

The Court: You are reading something in the way of a motion in the record. That wasn't anything in the way of testimony.

Mr. Zion: To show, sir, the basis upon which that testimony was put in; to show, sir, that at that time Mr. Curtin did not put it in as being material to the issue of the indictment, merely on the question, as he called it then, of credibility, to sustain our position that it was not material to the issue of the charge in that indictment. This was a matter that took place after the last date of the indictment and after any date set forth in the testimony put forth by the Government.

The Court: The objection is sustained.

8. The Learned Trial Judge erred in overruling defendant's offer in evidence as follows:

N. T. pages 33-4.

Mr. Zion: If the Court please, you have already ruled that I could not ask this witness, who is a court stenographer, as to whether or not at the last trial in the Government case they had produced any evidence whatever to show any transaction after January 20, 1942. That forces me to make a motion I didn't want to make. I, therefore, ask that there be offered in evidence all of the testimony of the Government in their case in chief in the other case, for the purpose of showing that there was not in issue any transaction that took place after January 20, 1942.

The Court: The Motion is denied. That is part of the defense if you wish to show it.

Mr. Zion: Of course, sir, that offer will come in my defense, but I wanted it here because of the objection of the United States Attorney when I asked a question of this witness. We could have saved all that examination and all that effort, because he had read through the notes and could answer. It would save a great deal of time, sir, if you would permit him to say that there was no such testimony or that there was.

The Court: I know, but you are quarreling with the rules of evidence.

Mr. Zion: I am not quarreling with the rules.

The Court: Yes, you are. You claim that he should not have objected.

Mr. Zion: I say it is material to this case to show whether or not it was material in the other case.

9. The Learned Trial Judge erred in overruling defendant's objection to the admission in evidence as follows:

N. T. page 38-9.

Q. Is that the duplicate bill head that you used in March, 1942?

Mr. Zion: I object, sir, to the question. It is certainly not material. He may testify if he prepared this bill or it was done under his supervision. He certainly can't testify nor is it material whether it was a duplicate bill that they used in their business or not.

The Court: Overruled.

10. The Learned Trial Judge erred in overruling defendant's objection to the admission in evidence as follows:

N. T. page 45.

Q. With respect to this particular transaction, did you know or was anything ever said to you that anybody else but Mr. Weiler was purchasing these tires at any time?

Mr. Zion: I object to that, sir. It is not proper re-direct-examination nor is it material.

The Court: The objection is overruled. He can recall him for that purpose. You may answer.

A. No, nothing like that was ever said. The transaction was supposed to be with Mr. Weiler.

11. The Learned Trial Judge erred in overruling defendant's objection to the admission in evidence as follows:

N. T. page 47.

Mr. Curtin: With your Honor's permission, I would like to offer this in evidence.

Mr. Zion: Will you note my objection, sir, on the ground of lack of materiality, because on the other, also, he admitted signing that paper and admitted taking affidavits, so it is not material here.

The Court: It takes in the whole picture.

Mr. Zion: Anyhow, note my objection, sir.

NOTE:

By this ruling, Government's Exhibit No. 4 was admitted into evidence.

12. The Learned Trial Judge erred in overruling defendant's objection to the admission in evidence as follows:

N. T. pages 48-9.

Q. At the particular time when you took that affidavit, was anything said to you, as office manager, about this purchase being for the account of somebody else?

A. No.

Mr. Zion: Objected to. There is no evidence here by anybody it was so stated.

13. The Learned Trial Judge erred in overruling defendant's objection to the admission in evidence as follows:

N. T. pages 50-1.

Mr. Curtin: I ask permission to offer this particular exhibit in evidence.

Mr. Zion: I object, sir, because it has not been properly proven. There is no one here who has testified that such a sale was made. He has merely testified the practice in his office was to have such a bill.

By The Court:

Q. Is this bill a part of the official records of your company?

A. Yes, sir.

The Court: The objection is overruled.

NOTE:

By this ruling, Government's Exhibit No. 5 was admitted into evidence.

14. The Learned Trial Judge erred in overruling defendant's objection to the admission in evidence as follows:

N. T. page 51.

Mr. Zion: Note my objection also, sir, to the reading of the bill, which is consistent with the other objection.

NOTE:

This refers to the reading to the jury of Government's Exhibit No. 5.

15. The Learned Trial Judge erred in overruling defendant's objection to the admission in evidence as follows:

N. T. page 54.

Mr. Zion: I renew my objection to the introduction in evidence of that bill.

The Court: Overruled. It is admissible as a part of the office records.

NOTE:

This Exception relates to Government's Exhibit No. 5.

16. The Learned Trial Judge erred in overruling defendant's objection to the admission in evidence as follows:

N. T. page 79.

Q. You went down to the Navy Yard—

Mr. Zion: I object to this type of examination: it is certainly not proper.

The Court: You opened it up by asking him how long after the time. That has a suggestion to it.

The Witness: I would like to answer it.

Mr. Curtin: That is the reason, if your Honor please. If there is any inference between the two jobs—

Mr. Zion: I didn't intend to make any such inference at the time, sir. I object to this line of examination.

The Court: It might have that sort of inference, so I am permitting him to re-examine him on the proposition.

Mr. Zion: Note my objection, sir, and you overrule the objection?

The Court: Yes.

17. The Learned Trial Judge erred in overruling defendant's motion to strike evidence from the record and for the withdrawal of a juror as follows:

N. T. page 80.

Mr. Zion: I ask that that be stricken from the record, and I ask for the withdrawal of a juror because of that statement.

The Court: The motion is denied. You opened the door yourself by asking him how long after he left this company he took another job.

NOTE:

The witness, Sweeney, stated there was a war.

18. The Learned Trial Judge erred in refusing defendant's motion for a directed verdict as follows:

N. T. pages 92, 95a, 131 and 132.

Mr. Zion: If the Court please, I move now for a directed verdict and would like to argue before the Court, not in the presence of the jury. I see it is now 4:10 anyhow, sir. . . .
at 95a

The Court: Well, let him explain further. The motion is overruled. . . .
at 131-2

Mr. Zion: If the Court please, I ask leave to renew my motion for a directed verdict for the defendant.

The Court: Overruled.

19. The Learned Trial Judge erred in overruling defendant's objection to the admission in evidence of testimony as follows:

N. T. page 124.

Q. Even if you file one in December, 1942, if you had transactions in tires after December—January, February or March—you would have to file a second P. D.-216, would you not?

Mr. Zion: I object to that. The indictment does not charge that.

The Court: Overruled.

A. That is right.

20. The Learned Trial Judge erred in charging the Jury as follows:

N. T. pages 135-6 and page 141.

That was a judicial proceeding, and I so charge you, and the matter testified to in that proceeding by the defendant was material to the investigation being made at that time in that trial, which leaves for your determination, as members of the jury, whether or not any false testimony given by the defendant was wilfully done, and whether or not in part the evidence which he gave at that time was false, and knowingly and wilfully false, known to him to be false, and given with the intent to deceive the Court and the jury in that case. . . .

at 141

Mr. Zion: Will you note these exceptions. I take exception only to that part of your charge, sir, where you said that you will direct that the matter was material to the issues.

21. The Learned Trial Judge erred in charging the jury as follows:

N. T. pages 136 and 141.

I have charged you that the testimony given upon that trial was material to the inquiry then being conducted, because it was admitted in evidence by the trial court there, and in addition it tended to test the credibility of the defendant who was a witness in his own behalf in that case, and in addition it was testimony given in regard to some transactions which were being inquired into under the counts which were submitted to the jury in that case.

at 141

Mr. Zion: Will you note these exceptions. I take exception only to that part of your charge, sir, where you said that you will direct that the matter was material to the issues.

The Court: You may have an exception to that.

22. The Learned Trial Judge erred in refusing to charge the jury as requested by the defendant as follows:

N. T. page 143

"1. That from the beginning of the trial, until the end, the District Attorney has the burden of establishing beyond a reasonable doubt, every fact essential to the conviction of the defendant; the defendant has no burden to sustain; it is enough that his evidence, taken with the Government's raises a reasonable doubt as to his guilt, in which case he must be acquitted."

23. The Learned Trial Judge erred in refusing to charge the jury as requested by the defendant as follows:

N. T. page 143

"2. That the defendant is presumed to be innocent, and this presumption continues throughout the trial and during the deliberations of the jury, and is overcome when, and only when, their guilt is established beyond a reasonable doubt."

24. The Learned Trial Judge erred in refusing to charge the jury as requested by the defendant as follows:

N. T. page 143

"3. In order to convict this defendant of perjury, the Government must produce testimony of a more direct and positive character, than is required to justify a verdict of guilty of other offenses.

Hart vs. United States, 131 F. 2d 59;
United States vs. Buckner, 118 F. (2d) 468;
Cohen vs. United States, 27 F. (2d) 712."

25. The Learned Trial Judge erred in refusing to charge the jury as requested by the defendant as follows:

N. T. page 144

"4. The Government's evidence must be clear, convincing and direct. Not only must you be satisfied of defendant's guilt beyond a reasonable doubt, but the Government must prove the falsity of the matter sworn to by him, by direct and positive evidence. Unless you are so satisfied, then you must find defendant not guilty.

Clayton vs. United States, 284 F. 537."

26. The Learned Trial Judge erred in refusing to charge the jury as requested by the defendant as follows:

N. T. page 144.

"5. An oath not required to be administered by any law or rule of court, even though false, is not perjury, although administered under the usage of an administerial officer.

United States vs. Babcock, Fed. Case No. 14,488."

27. The Learned Trial Judge erred in refusing to charge the jury as requested by the defendant as follows:

N. T. page 144.

"6. I direct you that an oath taken by this defendant to any letter, order or other writing, even though administered by a Notary Public duly authorized to administer oaths, when not required to be administered by any law or rule of court, is not perjury even though false."

28. The Learned Trial Judge erred in refusing to charge the jury as requested by the defendant as follows:

N. T. pages 144-5.

"7. (a) In a prosecution of perjury, there is a strong presumption of innocence, and therefore, credit must be given to what the defendant may have said under oath rather than to what he may have said to the contrary when not under oath.

7. (b) If you find that the defendant made oath to contradictory statements, you may not convict the defendant of perjury unless the Government can show that he deliberately made oath to a statement which was false and which of those statements were false."

29. The Learned Trial Judge erred in refusing to charge the jury as requested by the defendant as follows:

N. T. page 145.

"8. The Government must establish the falsity of the statement alleged to have been made by the defendant under oath, by the testimony of two independent witnesses or one witness and corroborating circumstances. Unless that has been done, you must find defendant not guilty."

30. The Learned Trial Judge erred in refusing to charge the jury as requested by the defendant as follows:

N. T. pages 145-6.

"9. (a) Whenever a circumstance relied on as evidence of criminal action, is susceptible of two inferences, one of which is in favor of innocence, such circumstance is robbed of all probative value, even though from the other inference, guilt may be fairly deducible

9. (b) Therefore, if you find that the acts and circumstances relied on by the Government to sustain the charge of guilt of the defendant, is susceptible of an inference of innocence, then you must find the defendant not guilty as charged."

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31. The Learned Trial Judge erred in refusing to charge the jury as requested by the defendant as follows:

N. T. page 146.

"10. If after you have retired, there arises a disagreement between you as to any part of the testimony, or if you desire to be informed of a point of law arising in the case, you must ask to be brought back into the Court and the information will then be given to you."

32. The Learned Trial Judge erred in failing to direct a verdict of acquittal.

33. The Learned Trial Judge erred in passing judgment and sentence against the defendant.

Peter P. Zion,
Attorney for Defendant.

NOTICE OF APPEAL TO CIRCUIT COURT OF APPEALS.

(Filed Oct. 8, 1943.)

Name and Address of Appellant: Lee F. Weiler, 1937 Sixty-Seventh Avenue, Philadelphia, Pennsylvania.

Name and Address of Appellant's Attorney: Peter P. Zion, 1600 Walnut Street, Philadelphia, Pennsylvania.

Offense: Perjury. Sec. 231, Title 18, U. S. C. A.

Sentence: One year and one day, custody of U. S. Marshal, E. D. of Pa.

I, the above named Appellant, hereby appeal to the United States Circuit of Appeals for the Third Circuit from the judgment above-mentioned on the ground set forth below.

Lee F. Weiler,
Appellant.

October 8, 1943.

Receipt is acknowledged of a copy of the notice of appeal this day.

Thomas J. Curtin,
U. S. Attorney.

GROUNDS FOR APPEAL.

1. That the indictment upon which the defendant was tried and convicted does not state facts which constitute a violation of any statute of the United States.

2. That the evidence produced by the Government does not prove sufficient facts to constitute an offense under any statute of the United States.

3. The learned trial Judge erred in refusing defendant's requests for charge to the jury.

4. The learned trial Judge erred in his rulings on the evidence during the course of the trial.

5. The learned trial Judge erred in his charge to the jury.

6. The learned trial Judge erred in overruling defendant's motion to withdraw a juror.

7. The learned trial Judge erred as a matter of law in denying defendant's motion for a directed verdict.

8. The learned trial Judge erred in denying defendant's motion for a new trial.

9. The learned trial Judge erred as a matter of law in denying defendant's motion in arrest of judgment.

Peter P. Zion,

Attorney for Defendant.

[fol. 188] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 8496

UNITED STATES OF AMERICA

vs.

LEE F. WEILER

ORDER

Before Biggs, Jones and Goodrich, J.J.

And now, to wit, this 8th day of October, A. D. 1943, upon consideration of the within Petition, in open Court, and on motion of Peter P. Zion, Esq., Attorney for the Petitioner, bail is fixed for the release of the petitioner, Lee F. Weiler, pending determination of his appeal, in the sum of Twenty five hundred dollars ($2500.00), to be approved and accepted before the Clerk of the United States District Court for the Eastern District of Pennsylvania.

By the Court: John Biggs, Jr., United States Circuit Judge.

Approved as to form.

Thomas J. Curtin, Assist. U. S. Attorney.

Endorsements—Order Admitting Defendant to Bail in $2500.00. Received & Filed Oct. 8, 1943. Wm. P. Rowland, Clerk.

[fol. 189] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1943

No. 8496

UNITED STATES OF AMERICA

vs.

LEE F. WEILER, Defendant-Appellant

Appeal from the District Court of the United States for the Eastern District of Pennsylvania

And now, to-wit, this 21st day of February A. D. 1944, it is ordered that Hon. Guy K. Bard, District Judge, for the Eastern District of Pennsylvania, be, and he is hereby assigned to sit in above case in order to make a full court.

Albert B. Maris, Circuit Judge.

Endorsements—Order Assigning Hon. Guy K. Bard for Argument. Received & Filed Feb. 21, 1944. Wm. P. Rowland, Clerk.

[fol. 190] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1943

No. 8496

UNITED STATES OF AMERICA

vs.

LEE F. WEILER, Appellant

And afterwards, to wit, the 21st day of February, 1944, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Honorable Albert B. Maris, Honorable Charles Alvin Jones and Honorable Guy K. Bard, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof.

And afterwards, to wit, on the 31st day of May, 1944, come the parties aforesaid by their counsel aforesaid, and the Court, now being fully advised in the premises, renders the following decision:

[fol. 191] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1943

No. 8496

UNITED STATES OF AMERICA

vs.

LEE F. WEILER, Appellant

Appeal from the District Court of the United States for the Eastern District of Pennsylvania

Before Maris and Jones, Circuit Judges, and Bard, District Judge

OPINION OF THE COURT—Filed May 31, 1944

By MARIS, Circuit Judge:

The defendant appeals from a judgment of conviction of perjury.[1] He contends that his alleged false testimony was not material to the question under inquiry and consequently that the conviction cannot be sustained. Since materiality is a question of law for the court[2] we shall [fol. 192] examine the prior proceedings to determine whether the testimony was material.

The defendant and one other were indicted jointly and charged with violating restrictions and rationing orders as to new rubber tires and tubes. The indictment was in four counts. At the conclusion of the Government's case the court directed a verdict for the defendant upon counts III and IV. The jury found the defendant not guilty upon counts I and II. Count II charged that the defendants conspired to defraud the United States on December 12, 1941 and divers dates theretofore and thereafter by making false bills or invoices, by failing to keep any records of sales or transfers, and by failing to file an inventory report of new tires and tubes.

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[1] Section 125 of the Criminal Code, 18 U. S. C. A. § 231 provides:

"Perjury. Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, shall willfully and contrary to such oath state or subscribe any material matter which he does not believe to be true, is guilty of perjury, and shall be fined not more than $2,000 and imprisoned not more than five years."

[2] See Sinclair v. United States, 279 U. S. 263, 298 (1929); United States v. Slutzky, 79 F. 2d 504 (C. C. A. 3, 1935).

During the course of the trial the Government proved that the Office of Price Administration and the Office of Production Management required those who had new rubber tires and tubes on hand December 12, 1941, the date of the order freezing the supply, to make out an inventory report upon Form PD-216 and that the defendant had not filed this report. Upon cross-examination the defendant testified that he received Form PD-216 on January 5, 1942, that the instructions thereon were to file the report on or before December 31, 1941 and that since he could not file it on time he did not file it at all. He was asked by the trial judge whether he had previously stated that he did not file the report because he was winding up his business. He said this was so—that the report had to be filed every three months. The trial judge then asked the defendant whether he had filed a report for the first three months of 1942. The defendant replied "The first one I couldn't file because on the face of it it was void, and the next one came three months later, [i. e. in March, 1942] and I had no stock." The United States Attorney asked the defendant if he had not in fact purchased new tires in March, 1942. The defendant answered that he had not. He was thereupon shown a letter addressed to the United [fol. 193] Petroleum Corporation, dated March 24, 1942, signed by him with his affidavit affixed, in which he stated that he had purchased 170 tires from that company on March 16, 1942. The defendant explained that the tires were in fact purchased by one Daniel L. Roatche, to whom he loaned the money for the purpose, but that he gave the letter stating that he had himself made the purchase in order to help out one Bernard E. Sweeney, an employee of the seller, who had become involved in the sale of the tires to Roatche.

In the trial upon the perjury indictment the Government undertook to prove that this testimony was false and that the defendant had in fact purchased and received 170 tires in March, 1942. The defendant contends that even if false this testimony was not material to the subject under inquiry and that the trial judge should have so decided as a matter of law and directed a verdict for the defendant.

We think that the testimony was as to a material matter. The reason for the defendant's failure to file the report in 1941 was the subject under inquiry. The Government contended it was with the intent to conceal and thereby to defraud the United States. The defendant claimed his failure to file the report was quite fortuitous and was due solely to the fact that he received the printed form too late for timely use. His failure to file subsequent forms which did arrive on time, therefore, shed light upon the credibility of his explanation. The question is whether the credibility of a witness is material to the inquiry in the sense in which that term is used in the perjury statute.[3] We think it is. It is well established that the false swearing need not be to the fact immediately in issue.

In United States v. Shinn, 14 F. 447, 453 (C. C. Ore. 1882), the court said "But when the superfluous or collateral matter is calculated and intended to prop and bolster [fol. 194] the testimony of the witness on some material point, as by clothing it with circumstances which add to its probability or strengthen the credibility of the witness," it is material. In Luse v. United States, 64 F. 2d 776 (C. C. A. 9, 1933), it was held that testimony which if believed would tend to establish the credibility of the witness was material. In United States v. Slutzky, 79 F. 2d 504 (1935), this court pointed out that a material matter does not mean necessarily a matter that directly affects the ultimate issue of the trial but means one that is legally capable of being proved in the cause. In Goins v. United States, 99 F. 2d

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[3] It is discretionary with the trial judge to determine how wide a range should be allowed in cross-examination upon a matter collateral to the issue but which is tendered for the purpose of testing the credibility of the witness. Wigmore on Evidence, (Third Edition) Vol. III, § 1006. Whether the trial judge abused his discretion has no bearing upon the question of materiality.

147 (C. C. A. 4, 1938), cert. dism. 306 U. S. 622, it was held that a witness commits perjury by swearing falsely not only as to the fact which is immediately in issue but also when he swears falsely as to material circumstances which have a legitimate tendency to prove or disprove such fact. In Blackmon v. United States, 108 F. 2d 572, 573, (C. C. A. 5, 1940) the court said "The materiality required is not as to any particular issue in the case, but as to the trial as a whole, that is, materiality is determined by whether the false testimony was capable of influencing the tribunal on the issue before it."

Applying any one of the above tests we conclude that the defendant's testimony as to the purchase of tires in March 1942 was material. It follows that the indictment based upon the alleged false testimony in the prior criminal proceedings was well founded. The court accordingly did not err in overruling the defendant's motion in arrest of judgment.

The defendant next assigns as error the refusal of the trial judge to charge that a perjury case the Government must establish the falsity of the statement made by the defendant by the testimony of two independent witnesses or one witness and corroborating circumstances.[4] This rule of [fol. 195] evidence has been the subject of cogent criticism.[5] Nevertheless, save for some exceptions not here relevant,[6] it continues to be applicable to perjury cases in the federal courts.[7] We, therefore, must begin with the premise that in the federal courts no defendant may ordinarily be convicted upon a charge of perjury which is supported by the testimony of but a single witness. It does not necessarily follow, however, that a defendant in a perjury case is entitled to have the jury instructed as to this rule of evidence. On the contrary not only historical considerations but practical considerations as well lead to the conclusion that the jury have no role to perform in its application. Moreover, as we shall see, even those courts which in theory have accepted the view that the jury are to be instructed upon the rule have in practice shown an increasing willingness to condone the refusal of the trial judge to give such instructions.

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[4] The defendant's eighth request for charge which the court denied was: "The Government must establish the falsity of the statement alleged to have been made by the defendant under oath, by the testimony of two independent witnesses or one witness and corroborating circumstances. Unless that has been done, you must find defendant not guilty."

[5] 7 Wigmore on Evidence, 3d Ed. §§ 2040-2043; State v. Storey, 148 Minn. 398, 182 N. W. 613, 15 A. L. R. 629 (1921); Marvel v. State, 33 Del. (3 W. W. Harr.) 110, 131 A. 317, 42 A. L. R. 1058 (1925); Goins v. United States, 99 F. 2d 147 (C. C. A. 4, 1938); United States v. Palese, 133 F. 2d 600, 602 (C. C. A. 3, 1943).

[6] United States v. Wood, 39 U. S. 430 (1840); United States v. Buckner, 118 F. 2d 468 (C. C. A. 2, 1941).

We will first glance briefly at the history of the rule and its nature.[8] In early times most perjury cases were tried in the Court of Star Chamber. That court, which followed the canon law, had absorbed much of the civil law in its procedure. In particular it had adopted the quantitative theory of evidence. This involved a counting of the oaths given in a judicial proceeding with victory going to the party with the greater number on his side. It was the intrinsic value of the oath rather than the credibility of the [fol. 196] witness's testimony which was considered important. The Court of Star Chamber accordingly required two oaths against the defendant's one to sustain a charge of perjury. In 1640 when the Court of Star Chamber was abolished by statute jurisdiction over the crime of perjury was transferred to the common law courts and with it was transferred the two oaths rule. That the rule thus transferred was quantitative in its nature is indicated by the reasons which the common law courts gave for its acceptance in perjury cases but not in other criminal cases. In the Seventeenth Century when the transfer of jurisdiction took place defendants in criminal proceedings in the common law courts were not permitted to testify in their own defense. In a perjury case, however, the defendant's allegedly false oath was before the court and jury. The courts accordingly reasoned that the prosecution should be required to produce two oaths to contradict the defendant's one since otherwise there would be the legal stalemate of one oath against another. This, it will be noted, was a purely quantitative idea.

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[7] Hammer v. United States, 271 U. S. 620 (1926), in which Justice Butler said (pp. 626, 627): "The general rule in prosecutions for perjury is that the uncorroborated oath of one witness is not enough to establish the falsity of the testimony of the accused set forth in the indictment as perjury. The application of that rule in federal and state courts is well nigh universal. The rule has long prevailed, and no enactment in derogation of it has come to our attention. The absence of such legislation indicates that it is sound and has been found satisfactory in practice."

[8] For a comprehensive account of the origin, and history of the Quantitative Rule in the Law of Evidence see Wigmore on Evidence (Third Edition) Vol. VII, §§ 2030-2043.

As originally taken over into the common law the rule, being quantitative in nature, required that the oaths of the two prosecution witnesses should both be directly adverse to the defendant's oath.[9] It is true that the rigor of the two oaths rule has long since been ameliorated by permitting evidence of corroborating circumstances to take the place of the second oath. But this modification came about in order to facilitate the conviction of perjurers. It was certainly not designed to provide them with additional opportunities to escape conviction. It would thus appear that the modification was not intended to change the fundamental nature of the rule to the extent of presenting a jury question where none had theretofore existed. Considered quantitatively the rule is purely one of law. The trial judge is in a position to determine whether the burden imposed by the rule upon the prosecution in this respect has been met. If it has been met he can submit the case to the jury. If the burden has not been met he can direct a verdict of not guilty.

[fol. 197] When we turn to a consideration of the rule in its practical operation we likewise reach the conclusion that it should be considered as purely quantitative in nature and as raising no question for the jury. Considered from the standpoint of the jury's task the interjection of the rule into their deliberations would impede rather than aid them in reaching a right decision upon the sole issue with which they are concerned, the guilt or innocence of the defendant. For if such an instruction is to mean anything it must mean that the members of the jury must make an independent decision as to the credibility of each government witness before they determine the guilt of the accused and, if they find themselves unable to credit the corroborating witness whom the Government has offered, they must acquit the defendant even though they may be so well satisfied of the credibility of the principal government witness as to be convinced beyond doubt of the defendant's guilt. Anyone who has had practical experience in the conduct of jury trials knows that the members of a jury who are thus convinced of the defendant's guilt cannot be expected to pay much attention to a rule such as this which, even if understood, is likely to be viewed by them as legalistic and technical.

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[9] See United States v. Wood, 39 U. S. 430, 440 (1840).

The traditional sphere of the jury is to determine from the evidence whether the guilt of a defendant has been established beyond a reasonable doubt. This they do by considering all the evidence which is presented to them, appraising its credibility, weighing it and reconciling it, if possible. This function is one which Anglo-American experience has shown that a jury is well qualified to perform. But it is quite a different matter to ask the twelve laymen who constitute a jury to engage in the difficult mental feat of giving simultaneous but wholly independent consideration to the question of the defendant's guilt from the standpoint of the testimony of each individual witness without regard to the testimony of the others and to declare the defendant not guilty if they find the story of a corroborating witness not credible even though they are so thoroughly satisfied by the other testimony of the defendant's guilt that the dis- [fol. 198] credited testimony does not even raise a reasonable doubt in their minds. We think it is unreasonable to ask the members of a jury to perform such a task and unrealistic to think that they will be able to do so if asked.

Moreover it seems to us that the application of the rule to the deliberations of a jury would necessarily thwart rather than further the ends of justice since it would have no other practical effect than to require the acquittal of a defendant whom the jury, after considering all the evidence, believed beyond a reasonable doubt to be guilty. If the corroborating evidence is so incredible as to raise a reasonable doubt in the jury's minds as to the defendant's guilt they will acquit him under their general instructions without reference to the rule under discussion. If, on the other hand, the evidence of the principal witness is so clear and convincing as to remove from the jury's minds any doubt as to the defendant's guilt despite their inability to credit the corroborating evidence, they will under their general instructions convict him. It is, therefore, only in this situation that the two witnesses rule could have any effect upon the jury's deliberations and its only possible effect could be to bring about the acquittal of a person whom the jury have found from the whole evidence to be guilty. We do not think that the processes of the criminal law should be permitted to accomplish any such jail delivery as this. Although, as we have indicated, the rule has been much criticized, nevertheless considered as a quantitative rule its application in perjury cases may perhaps be justified as affording a guarantee of the good faith of the prosecution. But to apply the rule to the deliberations of the jury is to transform it from an earnest of good faith on the part of the government into a loophole for the escape of perjurers from justice. No principle of law or public policy requires that of all criminals perjurers alone [10] should be singled out for such special protection.

[fol. 199] Finally we think that recent decisions upon this question indicate that in practice the courts no longer adhere to the theory that the defendant is entitled to have the jury instructed upon the rule, even though they may still pay lip service to it. While it is true that the rule has not been expressly rejected as a guide to the jury's action, it has been deprived of all practical application as such by the decisions which have held that the refusal of the trial judge to give instructions upon the rule did not substantially prejudice the defendant where it appeared that the quantum of evidence required by the rule was in fact offered by the Government.[11] Certainly, if the jury have any function to perform under such instructions, the performance of which might conceivably lead to the acquittal of the defendant rather than his conviction, the refusal of the instructions could hardly be said not to prejudice his rights. We have shown that the only possible effect of such instructions could be to secure the acquittal of a defendant who would otherwise be convicted.

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[10] We need not here consider the rule relating to persons accused of treason. The rule, embedded in Article III, Section 3, of the Constitution, that "No person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act" was derived directly from prior British Statutes which were passed expressly for the protection of persons accused of treason. Since the two rules, although apparently similar, were derived from wholly different sources and were adopted for wholly different reasons, the construction to be placed upon the treason rule has no bearing upon the effect to be given to the rule applicable in perjury cases.

Our consideration of the subject convinces us that the question whether the government has offered sufficient proof to meet the rule as to the quantum of proof required in a perjury case is and should be treated by the trial judge as purely a rule of law to be applied by him in determining whether the case should be submitted to the jury or a verdict [fol. 200] of not guilty directed. If the Government has met its burden by offering the evidence of two witnesses or of one witness and corroborating circumstances the case should be submitted to the jury for consideration upon all the evidence, as in any other criminal case. Under these circumstances to instruct the jury as to the requirements of the rule of law which the trial judge has already applied is not only unnecessary but, we think, unwise and inappropriate since the introduction of such an irrelevant matter may well tend to confuse the members of the jury and to deflect their attention from the question which has been submitted to them, namely, whether upon the entire evidence the defendant's guilt has been proved beyond a reasonable doubt.

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[11] In Goins v. United States the trial judge refused the defendant's request that the jury be instructed to the effect that the testimony of at least two witnesses, or of one credible witness and strong corroborating circumstances was necessary to a conviction of perjury. The Circuit Court of Appeals held that the refusal to give such instructions was harmless error because the defendant was not prejudiced thereby. 99 F. 2d 147 (C. C. A. 4, 1938). Certiorari was granted and in a per curiam opinion the Supreme Court stated, "As it appears on hearing argument that the District Court's failure to give Instruction B could not have prejudiced the petitioner, the writ of certiorari is dismissed." 306 U. S. 622 (1939). See also O'Leary v. United States, 158 F. 796 (C. C. A. 1, 1907); Pawley v. United States, 47 F. 2d 1024 (C. C. A. 9, 1931).

We accordingly conclude that the trial judge in this case was right in refusing to give the instructions requested.

It remains to be seen whether the evidence presented by the Government did as a matter of law satisfy the requirement of the quantitative rule of evidence applicable to perjury cases. We think that it was sufficient to satisfy the strictest requirement of the quantitative rule. The defendant's testimony which the Government alleged to be false was that he had not purchased tires in March, 1942. The Government proved by Bernard E. Sweeney, tire sales manager of United Petroleum Corporation, that the defendant agreed to purchase tires from that company and that on March 16, 1942 at Paulsboro, New Jersey, he supervised the delivery of 170 tires to Evans, the defendant's manager. Sweeney identified the truck operated by Evans as one which he had often seen about the defendant's place of business. Daniel L. Roatche testified that he was present when the defendant agreed to purchase the tires, when the tires were placed upon the defendant's truck at Paulsboro, New Jersey, and into the custody of Evans and that he saw the tires delivered to the defendant's place of business at Philadelphia. Joseph J. Gabel and John F. Oates, president and office manager respectively of United Petroleum Corporation, testified that the defendant acknowledged to [fol. 201] them on or about March 24, 1942 that he was the purchaser of the 170 tires. The Government also offered in evidence a letter signed and sworn to by the defendant in which he acknowledged that he had purchased the 170 tires.

It will thus be seen that the fact of the purchase was testified to by more than two witnesses and was shown as well by corroborating evidence, the letter to which we have already referred. The jury was, of course, at liberty to believe the defendant's version that the apparent sale of the tires to him was made just to cover up the sale of the tires to Roatche and Sweeney and to disbelieve Sweeney's and Roatche's denial that the tires were actually purchased by Roatche. This, however, was solely a question of the credibility of the evidence and not of its amount.

We conclude that the trial judge properly decided as a matter of law that the quantitative rule had been met by the Government's evidence and that he did not err in refusing the defendant's request that the jury be instructed upon the rule.

We have examined the other assignments of error and find them to be wholly without merit.

The judgment is affirmed.

BARD, *District Judge*, concurring.

I concur in the opinion, but wish to add these observations. My concurrence is based principally on the opinion of the Supreme Court in Goins v. United States, 306 U. S. 622 (1939). In that case the trial judge refused an instruction embodying the rule requiring corroboration. On appeal, the Circuit Court of Appeals in 99 F. 2d 147 affirmed the conviction, over a strong dissenting opinion, holding that failure to give the requested charge was not reversible error, because the refusal could not reasonably have affected the result.

The Supreme Court granted certiorari, 306 U. S. 623, limited to the question whether the Circuit Court of Appeals [fol. 202] should have reversed the judgment of conviction because of the refusal of the trial court to grant the instruction requested by the defendant. After hearing argument, the Supreme Court filed an opinion, 306 U. S. 622, holding that the District Court's failure to give the instruction requested could not have prejudiced the petitioner, and the writ of certiorari was dismissed.

If it be the law that on a charge of perjury the jury, in addition to determining the guilt or innocence from all the evidence, has the function, under instructions, to find the defendant not guilty unless the falsity of the statement is established by two independent witnesses or one witness and corroborating circumstances, then it seems to me the failure to give the requested instruction prejudiced the defendant in the Goins case. As the opinion of Judge Maris suggests, the performance of the function might conceivably lead to the defendant's acquittal. A failure to instruct under those circumstances would be highly prejudicial. But the Supreme Court said the failure to give the requested instruction did not prejudice the defendant. I take this to mean that after the required quantum of evidence has been submitted to the jury, it is the function of the jury to determine the guilt or innocence upon all the evidence, and a defendant so convicted has no ground for reversal.

In view of the Supreme Court's ruling, I cannot see how the trial judge in the case at bar committed reversible error in refusing to affirm the defendant's eighth request for charge. To hold otherwise would be to add confusion and to leave trial judges in a quandry without any guide as to how to instruct juries in perjury cases.

JONES, *Circuit Judge*, dissenting.

If it lay within our power to say that the testimony of one witness is sufficient to sustain a finding of guilt of perjury, the well-reasoned and cogent views expressed by my brother Maris would go a long way toward furnishing ample [fol. 203] justification for the enunciation of such a rule. However, it is my opinion that the rule which requires two witnesses or one witness and corroborating circumstances to sustain a finding of guilt of perjury is so firmly imbedded in federal criminal jurisprudence as to require for its alteration a positive legislative declaration to that end. See Hammer v. United States, 271 U. S. 620, where the Supreme Court said (p. 627) that "The absence of such legislation indicates that it [the rule as to the quantum of proof required in perjury cases] is sound and has been found satisfactory in practice." And, as lately as 1941 in Warszower v. United States, 312 U. S. 342, 347-348, the Supreme Court said that "* * * evidence of perjury, given by one witness only, does not as a matter of law establish beyond a reasonable doubt the commission of a crime * * *."

Such being the situation with respect to the proof required in perjury cases, I am unable to accept the view that the disposition made of Goins v. United States, 306 U. S. 622 (1939) was intended to change the rule so that thereafter one witness alone was sufficient to establish the commission of the crime of perjury.

It is true that in the Goins case the trial judge refused to charge, as requested, with respect to the proof required to convict of perjury and it is also true that the Court of Appeals affirmed the judgment of guilt entered below on the jury's verdict. But, an examination of the opinion in the Goins case (99 F. 2d 147, 149) discloses that the Court of Appeals deemed it "inconceivable" that the jury could have believed one and rejected the other of two witnesses to the act around which the defendant's alleged perjury revolved when both witnesses were corroborated by one and the same bit of documentary proof, viz., a hotel registration card signed by the defendant. The Court of Appeals, therefore, concluded that, since the jury must have believed the two witnesses, the trial error in the lower court's refusal of the requested instruction could not have been prejudicial to the defendant. The Supreme Court, in a per curiam opinion, dismissed the writ of certiorari "As it appears, on hearing [fol. 204] argument that the District Court's failure to give Instruction B could not have prejudiced the petitioner [defendant] * * * ". The Supreme Court did not, however, pass upon the possible error involved in the trial court's refusal to charge, as requested, for which the certiorari had been granted. See 306 U. S. at p. 623. I think that the Goins case was sufficient unto itself on its own peculiar facts and that the Supreme Court did not intend by its dismissal of the certiorari to change the rule as to the proof required to convict of perjury.

The question then is whether the rule is merely quantitative as to the number of witnesses to be produced by the prosecution or must the jury believe two witnesses or one witness and corroborating circumstances before guilt may be found. In his work on Evidence (Third Ed.) Vol. VII at § 2038, Wigmore says in discussing the proof required to support a charge of treason,—

> "(3) The rule of two witnesses means, by reason of the general principle * * * that they must be effective witnesses, *i. e.*, they must *both be believed by the jury*. A rule requiring a certain quantity of evidence is binding upon the jurors as well as upon the judge; they are not to convict unless in their judgment the required amount exists. If the testimony of one is rejected by the jury upon consideration, there remains but one witness,—less than the rule requires."

Nor do I think any distinction is relevantly to be drawn because the requirement as to the quantum of proof in treason cases is constitutionally prescribed. Our present concern is as to when the requirements of the two-witness rule can be said to have been met. That question can just as pertinently arise in a trial for perjury as it can in a trial for treason. The inquiry is whether the jury, in order to convict, must find the evidence credible to the extent of the quantity of proof which the law requires. I think it must. If the answer were otherwise, the rule would prove in practice to be but an empty form.

[fol. 205] Why then should a jury not be instructed accordingly in a perjury trial? The credibility of the testimony is ordinarily for the jury to determine and not for the court. But, suppose that the duty of finding the facts in a perjury trial should fall upon the court, because of the defendant's competent waiver of a jury trial, and, out of all of the evidence offered, the court could find only one credible witness. Will anyone say that, in such circumstances, the court would not forthwith enter a verdict of not guilty? That, I believe, is precisely what a court, sitting without a jury, would do, and it would do it, not because it was not satisfied of the defendant's guilt beyond a reasonable doubt on the basis of the testimony of the one credible witness but because the law provides that a conviction for perjury may not be had upon the testimony of one witness alone. If a court, because of its knowledge of and regard for the law, would so act in the circumstances, as above supposed, why, then, should the jury not be instructed as to the law by which they, too, should be guided in testing whether the required quantum of credible proof has been produced.

In the instant case the learned trial judge, although he carefully and, I think, correctly instructed the jury on the law pertinent to the facts of the case, failed to make any mention whatsoever of the quantity of credible proof necessary to be found present by the jury before a verdict of guilt could be returned. That, I think, was error, particularly in view of the fact that counsel for the defendant had submitted a request for a charge in material regard (see footnote 4 ante) which the trial court had refused. The court was, of course, not required to charge in the language of counsel's request even though it contained a correct statement of the law. See United States v. Quick, 128 F. 2d 832, 835 (C. C. A. 3) and cases there cited. But, the attention of the court having been specifically drawn to the pertinent matter for charge, by counsel's direct and formal request, it was the duty of the court to tell the jury in effect that unless they found the alleged perjurious act on the [fol. 206] basis of the credible testimony of two witnesses or of one witness and corroborating circumstances, it was their duty to acquit. United States v. Quick, supra, at p. 835.

Nor may the trial error, thus indicated, be overlooked as not having been prejudicial. The evidentiary situation in the instant case differed materially from that presented in the Goins case. Here, one witness testified in corroboration of the principal witness and two more testified to later admissions by the defendant. If the jury believed none but the principal witness, then their verdict rested on less than what the law requires. That they did believe more than the one witness is not to be inferred from the verdict in the absence of any instruction as to the quantity of proof required for the establishment of the defendant's guilt.

I should, therefore, reverse the judgment of the District Court and remand the case for new trial.

A true Copy:

Teste:

——— ———, Clerk of the United States Circuit Court of Appeals for the Third Circuit.

[fol. 207] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1943

No. 8496

UNITED STATES OF AMERICA

vs.

LEE F. WEILER, Appellant

Present: Maris and Jones, Circuit Judges, and Bard, District Judge

On appeal from the District Court of the United States, for the Eastern District of Pennsylvania.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Eastern District of Pennsylvania, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed.

By the Court, Maris, Circuit Judge.

May 31, 1944.

Endorsements—

Order Affirming Judgment.

Received & Filed May 31, 1944.

Wm. P. Rowland, Clerk.

IN THE

United States Circuit Court of Appeals

FOR THE THIRD CIRCUIT.

No. 8496. OCTOBER TERM, 1943.

UNITED STATES OF AMERICA,

vs.

LEE F. WEILER,
Appellant.

APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

PETITION FOR REHEARING

PETER P. ZION,
1600 Walnut St.,
Philadelphia, Pa.,
Attorney for Appellant.

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IN THE

United States Circuit Court of Appeals

FOR THE THIRD CIRCUIT.

October Term, 1943. No. 8496.

UNITED STATES OF AMERICA

vs.

LEE F. WEILER,
Appellant.

PETITION FOR REHEARING.

Now comes, Lee F. Weiler, defendant in the Court below and appellant herein, by Peter P. Zion, his attorney, and respectfully prays the Court to grant a rehearing in the above entitled cause for the following reasons:

1. This Court, in its majority opinion, filed May 31, 1944, found that the defendant swore falsely when he testified that he had not purchased some 170 tires in March of 1942.

2. The Record of this case indicates that the Government introduced into evidence (Government's Exhibit G2, Appendix 14a) a transcript of testimony given by the defendant in the earlier trial. That testimony so produced by the Government in the perjury trial discloses that the defendant there had testified in three different ways on the question of whether or not he had purchased the tires in question. At one point, he stated:

(Appendix 122a)

"Q. As a matter of fact didn't you buy tires in March, 1942?

A. I did not."

Later he testified (Appendix 128a):

"Q. But you said you didn't buy these?

A. I bought them for—I didn't take possession here.

Q. Did you buy these tires or didn't you?

A. No, I didn't buy them.

Q. You just—

A. I loaned my money to buy them.

Q. Did you get these tires?

A. No.

Q. Did you actually buy them for yourself?

A. No.

Q. You stated in the letter that you bought them?

A. That is right."

Later (Appendix 129a):

"Q. In other words, you wrote the letter and said that you had bought tires—

A. That is right,—these tires already delivered to Mr. Sweeney.

Q. You said that you had bought them?

A. That is right.

Q. And you had not?

A. That is right.

Q. So that you were making a mistake?

A. I wouldn't say a mistake. I was going to take—

Q. This letter doesn't say, "I am going to"—

A. "Inasmuch as * * * we have purchased"—

Q. "Inasmuch as you are a distributor we have purchased from you"—

A. That is right.

Q. Was that a correct statement?

A. Yes."

Later (Appendix 130a):

"Q. In that letter you said that 'we have purchased'?

A. Yes, sir.

Q. And you didn't purchase any?

A. No, I did not. I did not purchase them for my own use.

Q. Did you purchase them for anybody else?

A. Yes.

Q. What do you mean that you didn't purchase them?

A. I never received them. My notion is a purchaser—if you receive and pay for them.

Q. You mean to say that you purchased them for somebody else?

A. Yes, sir."

Again (Appendix 131a):

"Q. Why did you say in your letter that you were the purchaser?

A. I was the go-between. I was the buyer of the tires through United; he had already got them when this thing was signed.

Q. Let me ask you again—first of all, you didn't get the tires?

A. No, sir.

Q. Dan, The Tire Man got them?

A. Yes, sir, that is right.

Q. Did Dan, The Tire Man, buy them?

A. I don't know who bought them. Mr. Sweeney bought the tires."

(Appendix 132a):

"Q. When you stated in your letter that you did buy them, that is a mis-statement?

A. That is quite right, but it was an indirect buy."

(Appendix 139a):

"Q. And you knew that you were to be the purchaser?

A. That is right.

Q. And you knew you were to loan the money for it?

A. That is right."

(Appendix 142a):

"Q. Why did you give the money to Sweeney?

A. He was the one who made the transaction for the United Petroleum Corporation.

Q. Why didn't they sell the tires to Dan, The Tire Man?

A. No,—I couldn't say. He could of bought them direct if he had money.

Q. Somebody came to you and said, "Won't you finance this transaction?" Did it occur to you why Dan couldn't buy them direct?

A. He wanted me to buy them, and I didn't want them. Dan was in my office, and he said he would like to have them.

Q. Why didn't you tell Dan to transact the purchase of the tires direct?

A. He didn't have the money.

Q. Why could you not lend him the money to buy them under his own name?

A. He could have done it.

Q. Why didn't you?

A. Dan is a dealer, and if I remember under the ration regulations—

Q. I don't care about the ration regulations. It was a simple transaction,—somebody came to you and said that they wanted to buy tires?

A. Yes, sir.

Q. And 'will you lend me the money'? Is that what happened?—he said, 'I want to buy these tires'?

A. Yes. But he couldn't buy them from the United at the same price. Dan Roche is a dealer and not a distributor. I could purchase them as a distributor, and that is the reason for that order. He was a dealer.

Q. Dan could not have bought them?

A. No, Dan could not have bought them.

Q. Because that was a violation of the regulations of the OPA, is that right?

A. That is right, he could have sold them if Dan Roche was a—nobody quite understood the regulations,—but I could buy them.

Q. You said that Dan couldn't buy them, a half minute ago?

A. That is my interpretation that he couldn't.

Q. The reason that this transaction took place in the manner in which it did was because at the time you as a dealer could buy tires?

A. As distributor.

Q. And Dan could not?

A. That is right.

Q. Wasn't that a violation of the OPA regulations?

A. I wouldn't say it was a violation.

Q. He couldn't do it under the OPA?

A. That is right.

Q. So that you had to help or assist him to circumvent the OPA?

A. It wasn't circumventing the OPA; he could buy them from me and sell them.

Q. But he couldn't buy them direct from the company?

A. Nobody could answer that at that particular time—I don't know."

3. From these excerpts of the defendant's testimony in the earlier trial which was offered by the Government as its proof of the basis of the charge of perjury, it is conclusive that the defendant had explained and qualified his denial of purchase of the tires in such a manner as to remove the denial—admitting the legal purchase but explaining why he didn't consider himself the real purchaser. —"It was an indirect buy"—"as a go-between"—"for the benefit of a third party who eventually received the tires".

4. At most, the defendant's statements as to the purchase of the tires were contradictory and confusing.

It has been held that a conviction of perjury will not be sustained when the false oath relied upon is borne of an interpretation of a technical meaning of a term(1).

Here we have a defendant attempting to interpret the legal effect of an order that he gave for a purchase of tires where he claims he furnished the moneys for the benefit of another, although he admits the order was given in his name. Would it be reasonable to sustain a conviction of perjury relying upon this as proof of a false oath?

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(1) Fotie vs. United States—137 F. 2d 831, 840 (C. C. A. 8—Aug. 23, 1943)
Hart vs. United States—131 F. 2d 59, 61, 62

> "It is elementary that, in order to convict under an indictment for perjury, the evidence must be clear, convincing, and direct, and that the guilt of the accused should be estabiished beyond a reasonable doubt by the testimony of two independent witnesses or one witness and corroborating circumstances."

United States vs. Norris—300 U. S. 564
Bishop vs. United States—19 F. 2d 224
Salinger vs. United States—23 F. 2d 48
Danaher vs. United States—39 F. 2d 325
Read vs. United States—42 F. 2d 636
Tinsley vs. United States—43 F. 2d 890
Gargotta vs. United States—77 F. 2d 977, 981.

More than that, where the defendant in one part of his testimony denies the purchase, and then explains that he did purchase them but for the benefit of another and therefore he did not consider that a sale to him, has the Government proved the false oath?

Again, where a circumstance relied on as evidence of criminal guilt is susceptible of two inferences, one of which is in favor of innocence, such circumstance is robbed of all probative value, even though from the other inference guilt may be fairly deducible.(²)

5. In proving these statements of the defendant, the Government also proved the qualifications, contradictions and explanations which accompanied the form of denial of purchase. Under the authorities, a conviction of perjury obtained upon this character of evidence should not be permitted to stand.(¹)

6. Your Honorable Court held that the rule requiring testimony of two independent witnesses or one witness and corroborating circumstances continues to be applicable to perjury cases in the Federal Courts, and thereupon reached the conclusion that this rule should be considered as purely quantitative in nature and as raising no question for the jury. This Court further concludes that the question as to whether the Government has offered sufficient proof to meet the rule as to the quantum of proof required in a perjury case is and should be treated by the trial judge as purely a rule of law to be applied by him in determining whether the case should be submitted to the jury or a verdict of "Not Guilty" directed.

This Court thereupon found that the evidence presented by the Government did, as a matter of law, satisfy the requirement of the quantitative rule of evidence applicable to perjury cases. While your petitioner respect-

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(²) Turinetti vs. United States—2 F. 2d 15, 17.

(¹) See footnote (1) supra, page 6.

fully disagrees with the conclusion of law by your Honorable Court, nevertheless, accepting as he must for the time being, this to be the law, it is respectfully submitted that an analysis of the Record of the testimony offered in evidence by the Government definitely fails to satisfy this requirement.

If, indeed, the false oath were the statement that the defendant did not purchase the tires in question, there should have been two or more witnesses to prove that fact. However, as was set forth specifically in the Brief submitted in the Court below, and only by a short statement in the printed Brief filed before your Honorable Court, the Record does not support proof that this was the false oath.

The testimony offered by the Government shows three statements given at one time during the first trial by this defendant. Interpretations of those statements are as follows:

1. I did not purchase the tires.

2. I bought them for someone else.

3. I did not interpret this as a sale to me because, while I bought them, I bought them for someone else and I did not receive them, and I do not consider it a sale to me when I do not receive tires.

May a conviction of perjury rest upon an alleged false oath where the Government proves three statements such as this, upon which it relies?

7. A reading of all of the testimony given by the defendant in the first trial, as proved by the Government, discloses these absolute statements sworn to by him:

(1) I bought the tires for another;

(2) I did not receive them;

(3) I lent the moneys to Dan Roatche so that he might eventually receive the benefit of these tires. (I financed the deal for Roatche's benefit.)

There are then in this Record three absolute statements made by the defendant upon which a conviction of perjury could be sustained if proved to be false by two independent witnesses or one witness and corroborating circumstances.

8. The Court, if it had overlooked the effect of the defendant's testimony so proved by the Government and that testimony does not support proof of an alleged false oath (referring to the purchase of the tires in question), and if this Court so finds after a reconsideration of that evidence, then its conclusion that the evidence presented by the Government as a matter of law satisfied the requirement of the quantitative rule of evidence must be changed.

9. Applying the doctrine of law as found by this Court, even to the other alleged false statements, it must be found that the rule has not been met by the evidence.

The Court's attention is called to the fact that in its Opinion, an error was made when the Court states that Dan Roatche testified "that he saw the tires delivered to the defendant's place of business at Philadelphia". The testimony (Appendix 60a) is:

> "Q. Surely. Tell anything you know about it.
>
> A. The tires and I was on the truck that went to Paulsboro. It was operated by Evans, and I went along. The tires were delivered and were brought back to Philadelphia. *That particular night, I remember, it was raining quite hard, and my business was at Broad and Parish, a square and a half above Broad and Fairmount, and I alighted from the truck*

at that corner and went to my place of business, and that is all that I know about the transaction. * * *"

It is apparent, therefore, that Roatche left the truck on which these tires were being transported while the truck was still en route and therefore did not see and could not have seen the tires delivered to the defendant's place of business at Philadelphia. He specifically testifies otherwise.

This becomes important in considering whether the proof produced by the Government satisfies, as a matter of law, the quantitative rule of evidence found by this Court to be applicable in perjury cases.

There are only two other statements set forth in the indictment that are alleged to be false in the testimony given by the defendant in the earlier trial.

> 1. He denied that he had received the tires in question.
>
> 2. He alleged that he had lent the moneys to and that he had financed the transaction for the benefit of Roatche.

On the question of whether or not he received the tires, if the Court will note that Roatche did not testify that he was present when the tires were delivered at the defendant's place of business, then there is no evidence that the tires in question ever reached the defendant or were received by him. True, there is testimony that the tires were delivered to one Evans, who was in the employ of the defendant as the manager of his garage business; that this delivery was at Paulsboro, New Jersey (not the place of business of the defendant); and that the defendant was not present when they were delivered on the truck which Sweeney testified he had seen about the defendant's public garage. Surely this testimony did not meet the measure of the rule to satisfy the requirement above set forth.

10. The only remaining statement is that he had lent the moneys to Roatche. This, Roatche denied. No other witness' testimony was offered on this point by the Government, nor were there any corroborating circumstances offered to prove the falsity of the oath by the defendant, Weiler, that he had lent the moneys to Roatche.

If the testimony as to the purchase of the tires does not amount to a denial of the purchase, and is not a false oath, as appears from a reading of the Record in this cause, there is not that quantitative amount of evidence required by the rule set down by this Court.

Therefore, The Court below, in refusing to charge as requested, fell into error according to the measure and rule laid down by this Court.

11. It is further submitted that a reconsideration of the testimony will show that the condition of the Record would have required:

(a) the Court to charge the jury on the two witness rule as requested (in writing) by the defendant; and

(b) that, in fact, there was not such a quantum of proof as required for conviction in a perjury case.

12. The facts in the Goins case (99 F. 2d 147) are different from the facts in the present case. It is submitted that this case is not authority to justify an enunciation of the rule as laid down by your Honorable Court. That would wipe out, in effect, the necessity of the trial judge ever to charge a jury that the Government must establish the falsity of the statement alleged to have been made by the defendant under oath by the testimony of two independent witnesses or one witness and corroborating circumstances. If this be so, this Court would, in fact, overrule the Supreme Court when it said in the case of Hammer vs. United States, 271 U. S. 620, 627:

> "The absence of such legislation indicates that it (the rule as to the quantum of proof required in perjury cases) is sound and has been found satisfactory in practice."

In Warszower vs. United States, 312 U. S. 342, the Supreme Court stated:

> "* * * evidence of perjury, given by one witness only, does not as a matter of law establish beyond a reasonable doubt the commission of a crime * * *."

From this statement it must necessarily follow that the proof required is not one that is solely quantitative, but is such that goes to the question of establishing guilt beyond a *reasonable doubt.*

The question of reasonable doubt has always been and still is the burden to be resolved by the finding of the jury and not of the Trial Judge.

Under the rule as enunciated by this Court, there is a taking away from the jury of its duty to analyze and consider the credibility of witnesses. This then changes the theory of trial by jury as it exists under our system of law.

12. Counsel feels a sense of responsibility in this matter in that somewhere in his Brief or in oral argument, he failed to present the cause of the appellant properly to this Court.

In the typed Briefs submitted to the Court below, matters were stressed as an argument in support of the motions for new trial and in arrest of judgment that were more or less overlooked in the Brief filed with this Court.

Counsel took it for granted that there was no dispute as to the interpretation that a fair reading of the Record would give of the testimony by the defendant, Weiler, in the first trial. Possibly due to a feeling of overconfidence in this matter, either in the oral argument or in his printed Brief, he failed to properly present his client's cause to this Court. He sincerely feels that an injustice has been done to this defendant. He feels that the verdict of guilty as returned by the jury was unjust. He feels that the very question as to the belief of the testimony given by the defendant in the first trial, upon which the indictment of perjury was laid, was passed upon by the jury in the trial of that cause where he was found 'Not Guilty'. That same testimony was before that jury and witnesses were called by the Government in that case to rebut the testimony touching upon the transaction involving the tires in question. That jury found the defendant's testimony credible as against the Government witneses. In the light of a rereading of the defendant's testimony in such case, in addition to all other considerations, should a verdict of guilty now be sustained?

Wherefore, this Petition for reconsideration is pressed most seriously before your Honorable Court.

Respectfully submitted,

Lee F. Weiler, *Petitioner.*
By Peter P. Zion,
Attorney for Appellant.

I hereby certify that this petition is presented in good faith and not for the purpose of delay.

Peter P. Zion.

No. 8496

IN THE

United States Circuit Court of Appeals

For the Third Circuit

UNITED STATES OF AMERICA,
Appellee

vs.

LEE F. WEILER,
Appellant.

Appeal from a Judgment of The United States District Court for the Eastern District of Pennsylvania.

ANSWER TO PETITION FOR REHEARING

GERALD A. GLEESON,
United States Attorney.

THOMAS J. CURTIN,
Assistant United States Attorney.

2—340

Answer to Petition

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Third Circuit

October Term, 1943 **No. 8496**

United States of America, Appellee

vs.

Lee F. Weiler, Appellant

ANSWER TO PETITION FOR REHEARING

And now comes the United States of America, by Gerald A. Gleeson, United States Attorney in and for the Eastern District of Pennsylvania and Thomas J. Curtin, Assistant United States Attorney in and for said District, and respectfully represents to the Court that the Petition for a Rehearing filed by Defendant-Appellant should not be granted for the following reasons:

1. This Court, in its majority opinion, did not find that the defendant swore falsely when he testified that he had not purchased some 170 tires in March 1942. This Court, in its majority opinion, found (1) the testimony alleged to be false was as to a material matter (Opinion, page 3); and (2) "the fact of the purchase was testified to by more than two witnesses and was shown as well by corroborating evidence, the letter to which we have already referred." (Opinion, page 11).

The verdict of the jury finding defendant guilty of the commission of perjury, established the finding that the defendant swore falsely as to a material fact.

2. The portion of the Record copied on pages 2 to 6 of the Petition for Rehearing shows that defendant stated five times that he did not buy the tires, as follows:

> "Q. As a matter fact, didn't you buy tires in March 1942?
> A. I did not.
> Q. Did you buy these tires or didn't you?
> A. No, I didn't buy them.
> Q. Did you actually buy them for yourself?
> A. No.
> Q. You said that you had bought them?
> A. That is right.
> Q. And you had not?
> A. That is right.
> Q. And you didn't purchase any?
> A. No, I did not. I did not purchase them for my own use."

3. It is suggested that the excerpts of the defendant's testimony in the earlier trial which was offered by the Government as its proof of the basis of the charge of perjury show conclusively that the defendant repeatedly, clearly and definitely stated that he had not purchased the tires, and that he did not explain and qualify his denial of the purchase.

4. (a) It is suggested that the defendant's statements in which he denied the purchase of the tires were definite and unequivocal.

(b) It is suggested that the false statement concerning the purchase of tires—"I didn't buy them"—involved no interpretation of a technical meaning of a term. The defendant, after he made his categorical denial, was shown his purchase order, and we cannot conceive how this order or the word "purchase" can involve the interpretation of a technical meaning of a term.

(c) It is also suggested that the circumstantial evidence rule concerning two inferences, one for innocence and one for guilt, is not applicable, as the evidence was direct and not circumstantial.

5. It is suggested that the case was given to the jury, whose function it is to weigh the evidence, and that the jury's finding is amply supported by the evidence.

6-12. It is suggested that an analysis of the Record shows, as stated by the Court, that the Government had offered sufficient proof to meet the rule as to the quantum of proof required in a perjury case. "We think that it was sufficient to satisfy the strictest requirement of the quantitative rule." (Opinion, page 10)

For the reasons above set forth, counsel for the Government ask for the refusal of the Petition for a Rehearing.

Respectfully submitted,
GERALD A. GLEESON,
United States Attorney.
THOMAS J. CURTIN,
Assistant United States Attorney.

[fol. 228] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1943

No. 8496

UNITED STATES OF AMERICA

vs.

LEE F. WEILER, Appellant

Before Biggs, Maris, Jones, Goodrich and McLaughlin, Circuit Judges, and Bard, District Judge

Order Amending Opinion and Denying Rehearing

And now, July 10, 1944, upon consideration of the petition for rehearing and answer thereto, it is ordered that the sixth sentence of the sixteenth paragraph of the opinion of the court filed in the above entitled cause on May 31, 1944, which reads as follows:

> Daniel L. Roatche testified that he was present when the defendant agreed to purchase the tires, when the tires were placed upon the defendant's truck at Paulsboro, New Jersey, and into the custody of Evans and that he saw the tires delivered to the defendant's place of business at Philadelphia.

be amended to read as follows:

> Daniel L. Roatche testified that he was present when the defendant agreed to purchase the tires and when the tires were placed upon the defendant's truck at Paulsboro, New Jersey, and into the custody of Evans.

[fol. 229] And it is Further Ordered that the petition for rehearing be denied.

By the Court: Maris, Circuit Judge.

A true Copy:

Teste:

—— ——, Clerk of the United States Circuit Court of Appeals for the Third Circuit.

[fol. 230] United States of America,
Eastern District of Pennsylvania,
Third Judicial Circuit, set.:

I, Wm. P. Rowlands, Clerk of the United States Circuit Court of Appeals for the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original Appendix to Appellant's Brief, as constituting the portions of the record before this court at argument; and proceedings in this court in the case of United States of America vs. Lee F. Weiler, Defendant-Appellant, No. 8496, on file, and now remaining among the records of the said Court, in my office.

In Testitmony Whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 24th day of July in the year of our Lord one thousand nine hundred and forty-four and of the Independence of the United States the one hundred and sixty-ninth.

Wm. P. Rowlands, Clerk of the U. S. Circuit Court of Appeals, Third Circuit. (Seal.)

[fol. 231] Supreme Court of the United States

Order Allowing Certiorari—Filed October 9, 1944

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted, limited to the question presented by the petition for the writ which is stated as Question 1 in the respondent's brief.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 340

LEE F. WEILER,
Petitioner,
vs.

THE UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

HIRSH W. STALBERG,
PETER P. ZION,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 340

LEE F. WEILER,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Lee F. Weiler, by his attorney, Peter P. Zion, Esq., respectfully prays that a writ of certiorari issue to review the judgment and decision of the United States Circuit Court of Appeals for the Third Circuit in the above entitled case, affirming a decision of the United States

District Court for the Eastern District of Pennsylvania, which judgment and decision was rendered by the Circuit Court of Appeals on May 31, 1944, amended in an order amending the opinion and denying the rehearing under date of July 10, 1944.

The appeal in the Circuit Court of Appeals was taken from the judgment of the United States District Court for the Eastern District of Pennsylvania after verdict of guilty by a jury, which judgment imposed sentence upon and ordered commitment of the defendant below (appellant in the Circuit Court of Appeals and petitioner herein), upon an indictment for perjury.

Statement of the Matter Involved.

This case involved:

(a) The construction and procedural application of the two-witness rule in perjury cases;

(b) The construction and application of the rule of evidence relating to the propriety of a conviction upon indictment and proofs in perjury cases; and

(c) The construction and application of the rule as to the materiality of subject matter in a trial, the testimony in regard to which subject matter was the basis of the perjury charge.

The indictment for perjury was based upon testimony of the petitioner, Weiler, in a trial wherein he and one Evans were indicted for

A. Unlawfully concealing facts in a matter within the jurisdiction of the United States or an agency thereof, and

B. Conspiring to defraud the United States, to wit, making false representation in a matter within the jurisdiction of the United States or an agency thereof (R. 105-114).

There were four counts in the indictment. At the trial of the cause before His Honor, Harry E. Kalodner, Judge of the District Court, a verdict of not guilty was directed (R. 13) as to Counts III and IV. Count I charged the defendant with falsifying, concealing and covering up by a trick, etc., to wit, by a false and fraudulent sales invoice, a material fact in a transaction involving the sale of new rubber tires and tubes (R. 107-8). Count II charged the defendants with conspiring to defraud the United States by concealing and transferring new rubber tires and tubes in contravention of a regulation of the Office of Price Administration (R. 109).

Paragraphs 10 and 11 of Count II charged that it was a part of the conspiracy that defendants would not file an inventory of new rubber tires and tubes as of December 12, 1941, required to be filed on Form PD 216 on or before December 31, 1941; and on or before December 31, 1941, the defendants knowingly and wilfully failed to file such inventory (R. 110-11).

The jury acquitted the defendants on Counts I and II and they were accordingly adjudged not guilty (R. 13).

In this earlier case, hereinafter sometimes referred to as the "OPA case", Weiler took the witness stand in his own defense, and the present perjury case arose out of testimony given by Weiler on cross-examination in connection with the nonfiling of Form PD 216 referred to in Count II above. As to the specific matter charged in Count II of the indictment in the OPA case, viz., the wilful failure to file Form PD 216 on or before December 31, 1941, showing an inventory of new rubber tires and tubes as of December 12, 1941: Weiler satisfactorily explained that he did not receive Form PD 216 until January 5, 1942 (subsequent to the filing date), and that he did not therefore file it (R. 121). As stated above, the appellant was acquitted of this charge. However, Judge Kalodner, while inquiring into this matter during the Government's cross-examination of Weiler, brought out that a report on Form PD 216 had to be filed every three months (R. 121). In reply to a direct question by Judge Kalodner, the appellant stated that he did not file a report on Form PD 216 for the first three months of 1942 because "* * * that was in March and I had no tires then" (R. 122). It was this question of Judge Kalodner's that was the springboard of the present perjury case.

Subsequently Weiler testified upon cross-examination that he did not buy tires in March, 1942 (R. 122). It transpired upon further cross-examination that Weiler had participated in a tire transaction in March, 1942, with United Petroleum Co., wherein he appeared to be the purchaser; but he explained that he had been the nominal purchaser only; that he had not bought the tires for himself; that payment for the tires simply represented a loan to one Roatche (known as Dan The Tire Man), and that he, Weiler, had never received the tires, and had not purchased them for his own use; and that in saying that he had not purchased the tires, he said so because his notion of a purchaser was that of one who paid for and received the tires (R. 123-46 passim).

In the course of the cross-examination, Weiler testified more particularly that United Petroleum Co. had certain new tires in its possession which its tire manager, Bernard E. Sweeney, wanted to sell. Roatche wanted to acquire these tires and Weiler was asked to finance and be the middleman in the transaction (R. 126-128, 131). Sweeney and Roatche had done business together before and were very friendly (R. 141-142). Weiler, as a distributor, had a right under the rationing program to buy tires from United, but Roatche, as a dealer, could not buy them at the same price (R. 143). The appellant agreed to be the nominal purchaser (e.g. R. 126, 127, 129). The appellant loaned Roatche the necessary money (R. 131, 132 and 134); he had financed Roatche in other instances (R. 135, 140). This was all done, and Roatche returned appellant's money (R. 131).

Following acquittal in the OPA case, the appellant was indicted for perjury in May, 1943. The indictment charged Weiler with having testified falsely under oath in that in the OPA case he testified to certain material matters which he did not believe to be true, and which he knew to be false. In particularly setting forth the false oath, the indictment went on to quote excerpts from the testimony described above. The excerpts included not only the Weiler assertion that he had not bought tires in March, 1942, but also his subsequent explanations, qualifications and statements that although he appeared as a purchaser in the United Petroleum transaction, he nevertheless was not the real purchaser; that he had signed the order for the tires in question for the accommodation of Roatche, to whom he in effect advanced the purchase price of the tires as a loan, which loan was repaid to him by Roatche (R. 3-11). The indictment alleged that in so testifying Weiler knew the truth to be that he had purchased the tires in March, 1942, from United Petroleum; that he had accepted delivery of the tires; that he had paid for them; that he had not loaned the money for the purchase of the tires, and that he had not acted as an accommodation party to the transaction (R. 10-11).

At the trial of the perjury case the Government's evidence boiled down to this:

(a) Representatives of the United Petroleum testified that Weiler had purchased the tires from the Company (R. 41-45) and eight days later at the request of United Petroleum had written a letter so stating (R. 27, 147), so that United could show OPA that a competent person had purchased the tires (R. 28).

(b) Sweeney of United Petroleum testified that at Paulsboro, N. J., United Petroleum delivered the tires to Evans, employee of Weiler, who loaded them upon a truck which Sweeney had previously seen in and around Weiler's public garage (R. 41-45).

(c) Roatche testified that he was not involved in the tire transaction, and that Weiler did not loan him the money for it (R. 59-61), although admitting that he was with Evans when United delivered the tires to Evans (R. 61) and helped load the tires on the truck (R. 62); he went along because he had nothing else to do (R. 62).

For the defense Weiler repeated the story he had told in the OPA case (R. 73-91).

At the conclusion of the trial, defendant's counsel in writing requested the court to charge as follows:

> "(8) The Government must establish the falsity of the statement alleged to have been made by the defendant under oath, by the testimony of two independent witnesses or one witness and corroborating circumstances. Unless that has been done, you must find defendant not guilty" (R. 103).

The request was denied (R. 100) and not in any way covered or adverted to in the charge.

Motions in arrest of judgment (R. 166) and for a new trial (R. 151) were denied, and Weiler was sentenced to jail for a year and a day (R. 167). Weiler appealed to the Circuit Court of Appeals (R. 186), which affirmed (R. 204).

In affirming, Maris, J., who wrote the majority opinion, held that refusal of the trial judge to instruct the jury on the two-witness rule in perjury cases was not error; and further *that not only was it unnecessary so to instruct the jury, but that the instruction "would impede rather than aid them in reaching a right decision"*; that in effect a defendant was not entitled to such instruction under *any* circumstances, and that the requirements of justice would better be met by withholding rather than stating such instruction (R. 195-6).

Bard, J., in a concurring opinion (R. 200), based his concurrence principally on the opinion of the United States Supreme Court in the case of *Goins* v. *United States*, 306 U. S. 622, 59 S. Ct. 783, 83 L. Ed. 1027, *interpreting that decision to mean that under no circumstances was such a refusal to instruct* (upon the two-witness rule in perjury cases) *reversible error.*

Neither the majority nor the concurring opinion held the alleged error harmless or nonprejudicial.

Jones, J., dissenting (R. 201), furnished an analysis of the legal problem involved, and concluded that the refusal to grant the instruction requested was reversible error. In the last paragraph of his opinion, he pointed out the error was prejudicial, unlike the Goins case (R. 203-4).

Upon the question of materiality of subject matter, concerning which allegedly false testimony was given, Maris, J., in the majority opinion, while conceding the rule of materiality, held that the subject matter of the testimony was material within the meaning of the Federal Perjury Statute. That phase of the case was not touched upon in either the concurring or dissenting opinions.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of

February 13, 1925 (43 Stat. 938, U. S. C., Title 28, Sec. 347). The judgment of the United States Circuit Court of Appeals for the Third Circuit to be reviewed was entered on May 31, 1944 (R. 204); opinion amended and rehearing denied July 10, 1944 (R. 225).

Questions Involved.

(a) Is a defendant indicted for perjury *never* entitled upon request to have the trial court instruct the jury upon the so-called two-witness rule in perjury cases?

(b) Whether a conviction for perjury may be sustained upon an indictment charging, and proofs showing, not only the contradictory statements of the defendant, but also the qualifications and explanations accompanying them?

(c) Whether the court below, in holding material the matters, the testimony regarding which is the basis for the perjury charge, did not so strain the concept of materiality as to constitute or create a departure from the materiality rule in perjury cases in force in the Third Circuit and in other Circuits?

Reasons Relied On for Allowance of Writ.

A. In holding that under no circumstances is a defendant indicted for perjury entitled to have the jury instructed on the two-witness rule in perjury cases, and that such instruction would impede rather than aid a jury in arriving at its verdict, the Circuit Court of Appeals for the Third Circuit

1. has rendered a decision in conflict with the decisions of other Circuit Courts of Appeal on the same matter: Goins vs. U. S. 99 Fed. (2d) 147 (4th Cir.); Allen vs. U. S. 194 Fed. 664 (4th Cir.); Pawley vs. U. S. 47 Fed. (2d) 1024 (9th Cir.);

2. has decided an important question of federal law which has not been, but should be, settled by the Supreme Court of the United States;

3. has decided a federal question in a way probably in conflict with applicable decisions of the Supreme Court of the United States: Goins vs. U. S., 306 U. S. 622, 59 S. Ct. 783, 83 L. Ed. 1027;

4. has divided its opinion, in that two judges (Maris and Bard, J. J.) voted for affirmance, and one judge (Jones, J.) voted for reversal.

B. In holding that a conviction for perjury may be sustained upon an indictment charging, and proofs showing, not only contradictory statements of the defendant, but also the qualifications and explanations accompanying them,

1. the Circuit Court of Appeals for the Third Circuit has rendered a decision in conflict with the decision of another Circuit Court of Appeals on the same matter: Fotie vs. U. S., 137 Fed. (2d) 831, 840.

C. In holding the subject matter of the testimony constituting the basis of the perjury charge to be material, the Circuit Court of Appeals for the Third Circuit

(1) has so strained the concept of materiality in perjury cases as to render a decision in conflict with the decision of other Circuit Courts of Appeals on the same matter: Clayton vs. U. S. 284 Fed. 537 (4th Cir.); Blackmon vs. U. S., 108 Fed. (2d) 572 (5th Cir.);

(2) has rendered a decision in a way probably in conflict with its own prior decisions: Melaragno vs. U. S., 88 Fed. (2d) 264, and Verro vs. U. S., 95 Fed. (2d) 504.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Third Circuit, sitting at Philadelphia, Pennsylvania, commanding that Court to certify and to send to this Court on a day certain to be therein named a full and complete transcript of the record and all proceedings had in this case numbered and entitled on its docket October Term, 1943, No. 8496, to the end that this case may be reviewed and determined by this Court; that the said judgment of the United States Circuit Court of Appeals for the Third Circuit may be reversed by this Court; and that your petitioner may have such other and further relief in the premises as may seem just and proper.

And your petitioner will ever pray.

Hirsh W. Stalberg,
Peter P. Zion,
Attorneys for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 340

LEE F. WEILER,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinion Below.

No opinion was written by the District Court. The opinion of the Circuit Court of Appeals for the Third Circuit appears in the record at page 190. The concurring opinion appears at page 200. The dissenting opinion appears at page 201. None of the foregoing opinions has yet been reported in the official reports.

Jurisdiction.

The grounds on which jurisdiction of this Court is invoked are set forth in the petition at pages 7-8 thereof.

Statement of the Case.

The statement of the case appears in the petition at pages 2 to 7, and in the interest of brevity is not repeated herein.

Specifications of Errors.

The errors which petitioner will urge, if writ of certiorari be granted, are that the Circuit Court of Appeals for the Third Circuit erred

1. In affirming the judgment of the District Court;

2. In holding that under no circumstances is a trial judge required upon request to instruct the jury as to the two-witness rule in perjury cases;

3. In holding that the conviction could be sustained notwithstanding the character of the indictment and the proofs involving, as they did, the explanations and qualifications to the contradictory statements of the petitioner (as more fully set forth in the statement of the case and reasons for allowance of writ in the foregoing petition);

4. In holding that the subject matter of the testimony charged to be perjured was material.

Statute Involved.

Section 125 of the Criminal Code (Rev. Stat. Sec. 5392, Act of March 4, 1909, c. 321, Sec. 125, 35 Stat. 1111, 18 U. S. C. A., Sec. 231).

ARGUMENT.

A. Instructions to the Jury under the Two-Witness Rule.

The validity of the rule is not in question. It has been formulated as follows in the case of *Hammer* v. *U. S.*, 271 U. S. 620, 626, 46 S. Ct. 603; 70 Law Ed. 1118, 1120:

> "The general rule in prosecutions for perjury is that the uncorroborated oath of one witness is not enough to establish the falsity of the testimony of the accused set forth in the indictment as perjury."

The petitioner's contention is that (harmless or unprejudicial error apart) a defendant indicted for perjury is entitled, upon request, to have the trial judge instruct the jury as to the rule.

The Circuit Court flatly rejected this contention, *not limiting its rejection to cases of harmless or unprejudicial error.*

Thus it is in conflict with the following decisions of other Circuit Courts of Appeals:

(a) *Goins* v. *U. S.*, 99 Fed. (2d) 147, where it is said, pages 148-9:

> "On the second point it may be assumed that the requested instruction embodied correctly the rule of law as applied in the federal courts, where it has been uniformly held that the uncorroborated oath of one witness is not enough to establish the falsity of the oath as to which perjury is charged, and that, except where the falsity of such oath is indisputably established, as by documentary evidence, it must be shown by the testimony of at least two witnesses, or by the testimony of a witness corroborated by circumstances proved by independent testimony. *And it may be assumed also that ordinarily the defendant is entitled to have the jury so instructed.*" (Italics supplied.)

(b) *Pawley* v. *U. S.*, 47 Fed. (2d) 1024, 1036, where it is said (after quoting the two-witness rule from *Hammer* v. *U. S., supra*):

> "In a proper case, therefore, it is the duty of the court to give an instruction embodying this principle of law, if timely requested."

(c) *Allen* v. *U. S.*, 194 Fed. 664, 668.

The court below went further in its opinion. It said (R. 195):

> "Considered from the standpoint of the jury's task the interjection of the rule into their deliberations

> would impede rather than aid them in reaching a right decision upon the sole issue with which they are concerned, the guilt or innocence of the defendant."

Jones, J., in his dissenting opinion (R. 203) rejected this reasoning, posing the rhetorical question why a jury should not be instructed as to the law by which they should be guided in testing whether the required quantum of credible proof had been produced.

Opposed also to the majority opinion's view of the question is Wigmore's Quotation from Best's Evidence (Wigmore on Evidence, 2d Ed. p. 322) analyzing and stating the foundation for the rule and emphasizing its "great objects".

Jones, J., in his dissenting opinion also pointed out the analogy between treason and perjury cases, citing Wigmore, 3rd Ed., Vol. 7, Sec. 2039, for the proposition that in treason cases the similar two-witness rule means that the two witnesses must be *effective* witnesses, i. e., they must both be believed by the jury.

It is patent that in a perjury case, where the required two witnesses appear and testify, the jury may believe one and not the other; but in their ignorance of the requirements of the rule, convict, nevertheless, with the consequence that the rule is ignored, and the defendant deprived of the protection which the rule is designed to afford.

It is important to note that had not Bard, J., completely misunderstood the true meaning of the decision of the Supreme Court of the United States in *Goins* v. *U. S.*, 306 U. S. 622, he would not have concurred with Maris, J., and the conviction would have been set aside.

For Judge Bard specifically stated that he based his concurrence principally on the opinion in the *Goins* case.

The Supreme Court in the *Goins* case based its per curiam affirmance solely and specifically on the ground that the District Court's failure to instruct as to the two-witness rule could not have prejudiced the petitioner (under the peculiar facts of that case).

But to Judge Bard that meant—and he was careful so to state—that in no case or under any circumstances is a trial judge required so to instruct the jury, because he felt that failure to instruct (since it might conceivably lead to the defendant's acquittal) would *always* be highly prejudicial. And since in the *Goins* case the Supreme Court had held that failure to instruct was not prejudicial, Judge Bard concluded that a trial judge is *never* required so to instruct.

It is contended that what Judge Bard failed to realize was that the decision in the *Goins* case means that the defendant was not prejudiced *under its own particular facts;* and that while failure to instruct was error, the error was harmless.

To demonstrate the applicability of what has been said, the petitioner respectfully directs the attention of your Honorable Court to the following:

The crux and heart of the perjury case lay in the question whether Weiler was only the nominal purchaser for Roatche's benefit, or whether he was the actual purchaser. This in turn depended upon the factual question whether he had loaned the money to Roatche for the purchase of the tires.

If in truth Weiler were merely financing the transaction, if he were the nominal purchaser only, if he loaned the money to Roatche and Roatche repaid him, then Weiler was not testifying falsely in stating that he did not purchase tires in March of 1942.

But the only witness for the Government in the trial of the perjury case who testified that no loan was made was Roatche. On this point, the proofs boil down to oath against oath—Roatche's testimony against Weiler's. It is to be observed that other testimony for the Government related only to the order given by Weiler for the purchase of the tires, and the delivery of the tires to Evans *at Paulsboro, New Jersey—not* Weiler's place of business. Such other testimony had no probative value with regard to the point at issue, for Weiler conceded freely at the O.P.A. trial that he had given the order. This testimony could not by its nature resolve the question whether Weiler was the actual or only the nominal purchaser. Thus, the requirements of the two-witness rule were not satisfied, there being no corroboration of the point mentioned.

Or, taking the view of the dissenting judge below, the jury may well have accepted and believed *only* the testimony of the principal witness; and, rejecting all other testimony, convicted, nevertheless, in violation of the rule of which they were ignorant.

But it is impossible to probe the minds of the jurors and know what they rejected and what they accepted. This difficulty would not arise if the jury had been properly instructed. Error in failing to instruct, therefore, was harmful and prejudicial.

This question—i.e., whether a trial judge need *never* instruct—has not been settled by the Supreme Court of the United States.

It is contended that the decision of the Circuit Court of Appeals for the Third Circuit, hinging (since there was a dissent) upon the concurrence of Bard, J., is in conflict with the *Goins* case in the Supreme Court.

B. The Nature of the Indictment and Proofs Cannot Support the Conviction.

Weiler testified upon cross-examination that he did not purchase tires in March, 1942. It then developed that at that time he had arranged a purchase of tires and paid for them. He explained this transaction by testifying further that he was the nominal purchaser only; that he had advanced the money for the tires, but only as a loan to

Roatche, who was the real purchaser; that Roatche had repaid the loan; and that his, Weiler's connection with the transaction was merely that of one who financed it for another. (This is testimony given at the O.P.A. trial.)

The general rule is that perjury will not be predicated upon false statements corrected before submission of the case in which made (48 C.J. 828 and cases there cited).

In applying an extension of this rule, the Circuit Court of Appeals for the Eighth Circuit, in *Fotie* v. *U. S.*, 137 Fed. (2d) 831, 840, set aside a conviction of perjury where, in proving inconsistent admissions and contradictory statements of one indicted, the Government also proved the qualifications and explanations which accompanied the great majority of them.

So here. The indictment in the case at bar did not content itself with charging that Weiler falsely testified that he had not purchased the tires in March, 1942, knowing the truth to be otherwise. The indictment set forth in addition, Weiler's further testimony consisting of explanations and qualifications of his first statement.

Thus the Circuit Court of Appeals for the Third Circuit has rendered a decision in conflict with the one rendered by the Eighth Circuit on the same matter.

This is an important question; for it is patent that a judicial investigation holds out every inducement to a witness to tell the truth by inflicting severe penalties upon those who do not, and that this inducement would be destroyed if a witness could not correct a false statement except by running the risk of being indicted and convicted for perjury.[1]

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[1] *Brannen* v. *State*, 94 Fla. 656, 114 S. 429, 431; *Peo.* v. *Gillette*, 126 App. Div. 665, 673, 11 N. Y. S. 133, 22 N. Y. Cr. 400.

"The false assertion, after being explained or corrected by the witness, formed no part of his testimony; and cannot be brought forward to sustain a plea of justification charging him with perjury:" *Henry* v. *Hamilton*, 7 Blackf. (Ind.) 506, 509.

Search has not revealed that the Supreme Court of the United States has settled this important question of federal law.

C. The Question of Materiality.

The Court below did not question the rule that a conviction for perjury must be grounded upon material matter, but held material the subject matter of the testimony.

In the earlier O.P.A. case, Weiler and Evans were tried for acts committed prior to January 4, 1942 (submitting a false statement to the United States as to transactions involving the sale and transfer of tires and tubes); and upon cross-examination the Trial Judge and the United States Attorney developed a transaction occurring two months later—in March 1942: a transaction allegedly involving a purchase of tires by Weiler, and an alleged violation of the regulations requiring that the transaction be reported: in other words, an actionable criminal offense.

This means that in an attack upon the credibility of the witness the Government was permitted to inquire into a possible criminal offense of the defendant, other and subsequent to those charged in the indictment, for which possible offense there had been neither indictment nor conviction.

But in *Melaragno* v. *U. S.*, 88 Fed. (2d) 264 (3rd Cir.), Opinion by Maris, J., a conviction was reversed because the Government upon cross-examination inquired of the defendant whether he had been convicted and sentenced for a prior misdemeanor (not a *crimen falsi*); and in *Verro* v. *U. S.*, 95 Fed. (2d) 504, (3rd Cir.) a similar conclusion was reached where cross-examination concerning *prior arrests was permitted*—also where no moral turpitude, felony or *crimen falsi* was involved.

Cross-examination as to subsequent acts not involving moral turpitude, etc., being *a fortiori* improper, it follows that the court below has rendered a decision in conflict with its own prior decisions on the same matter without overruling them.

Since such instances of permitted cross-examination frequently arise, this becomes an important matter of federal law. Permitting such cross-examination erases all limits or bounds to the concept of materiality as a basis for prosecution in perjury cases. Moreover, the inquiry and the testimony elicited thereby were such that they could not conceivably influence the decision of the jury in the O.P.A. case; hence, failing to meet the definition of materiality in the Federal Perjury Statute, they could not be used as a basis for indictment or conviction of perjury.

Search has failed to reveal that the question has been settled by the Supreme Court of the United States.

Conclusion.

It is, therefore, respectfully submitted that for the foregoing reasons your Honorable Court should grant the petition for certiorari.

Respectfully submitted,

Hirsh W. Stalberg,
Peter P. Zion,
Attorneys for Petitioner.

FILE COPY

DEC 11 1944

CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 340

LEE F. WEILER,
Petitioner,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF PETITIONER

HIRSH W. STALBERG,
PETER P. ZION,
Counsel for Petitioner.

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STATUTE

Judicial Code, Section 240a, as amended by the Act of February 13, 1925 (43 Stat. 938, 28 U. S. C. 347) 1

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 340

LEE F. WEILER,

Petitioner,

vs.

THE UNITED STATES OF AMERICA

BRIEF OF PETITIONER

Opinion Below

No opinion was written by the District Court. The opinion of the Circuit Court of Appeals for the Third Circuit appears in the record at page 190. The concurring opinion appears at page 200. The dissenting opinion appears at page 201. None of the foregoing opinions has yet been reported in the official reports.

The opinions of the court below, however, have been printed in the Advance Reports identified as 143 F. (2d) p. 204.

Jurisdiction

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (43 Stat. 938, U. S. C., Title 28, Sec. 347).

The judgment of the United States Circuit Court of Appeals for the Third Circuit to be reviewed was entered on May 31, 1944 (R. 204); opinion amended and rehearing denied July 10, 1944 (R. 225).

Statement of the Case

The petitioner, Weiler, was indicted for perjury and tried in the District Court for the Eastern District of Pennsylvania.

The indictment for perjury was based upon testimony of Weiler in a trial wherein he and one Evans were indicted for

> A. Unlawfully concealing facts in a matter within the jurisdiction of the United States or an agency thereof, and
>
> B. Conspiring to defraud the United States, to wit, making false representation in a matter within the jurisdiction of the United States or an agency thereof (R. 105-114).

There were four counts in the indictment in the earlier case. At the trial of the cause before His Honor, Harry E. Kalodner, Judge of the District Court, a verdict of not guilty was directed (R. 13) as to Counts III and IV. Count I charged the defendants with falsifying, concealing and covering up by a trick, etc., to wit, by a false and fraudulent sales invoice, a material fact in a transaction involving the sale of new rubber tires and tubes (R. 107-8). Count II charged the defendants with conspiring to defraud the United States by concealing and transferring new rubber tires and tubes in contravention of a regulation of the Office of Price Administration (R. 109).

Paragraphs 10 and 11 of Count II charged that it was a part of the conspiracy that defendants would not file an inventory of new rubber tires and tubes as of December

12, 1941, required to be filed on Form PD 216 on or before December 31, 1941; and on or before December 31, 1941, the defendants knowingly and wilfully failed to file such inventory (R. 110-11).

The jury acquitted the defendants on Counts I and II and they were accordingly adjudged not guilty (R. 13).

In this earlier case, hereinafter sometimes referred to as the "OPA case", Weiler took the witness stand in his own defense, and the present perjury case arose out of testimony given by him on cross-examination in connection with the nonfiling of Form PD 216 referred to in Count II above. As to the specific matter charged in Count II of the indictment in the OPA case, viz., the wilful failure to file Form PD 216 on or before December 31, 1941, showing an inventory of new rubber tires and tubes as of December 12, 1941: Weiler satisfactorily explained that he did not receive Form PD 216 until January 5, 1942 (subsequent to the filing date), and that he did not therefore file it (R. 121). As stated above, the petitioner was acquitted of this charge. However, Judge Kalodner, while inquiring into this matter, during the Government's cross-examination of Weiler, brought out that a report on Form PD 216 had to be filed every three months (R. 121). In reply to a direct question by Judge Kalodner, the petitioner stated that he did not file a report on Form PD 216 for the first three months of 1942 [1] because "* * * that was in March and I had no tires then" (R. 122). It was this question of Judge Kalodner's that was the springboard of the present perjury case.

Weiler testified upon further cross-examination that he did not buy tires in March, 1942 (R. 122), but that he had participated in a tire transaction in March, 1942, with United Petroleum Co., wherein he appeared to be the purchaser; but he explained that he had been the nominal purchaser only; that he had not bought the tires for himself; that payment for the tires simply represented a loan to one Roatche, and that he, Weiler, had never received the tires, and had not purchased them for his own use; and that in saying that he had not puchased the tires, he said so because his notion of a purchaser was that of one who paid for and received the tires (R. 123-46 passim).

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[1] This matter was subsequent to the date of any offense charged in the indictment.

In the course of the cross-examination, Weiler testified more particularly that United Petroleum Co. had certain new tires in its possession which its tire manager, Bernard E. Sweeney, wanted to sell. Roatche wanted to acquire these tires and Weiler was asked to finance and be the middleman in the transaction (R. 126-128, 131). Sweeney and Roatche had done business together before and were very friendly (R. 141-142). Weiler, as a distributor, had a right under the rationing program to buy tires from United, but Roatche, as a dealer, could not buy them at the same price (R. 143). The petitioner agreed to be the nominal purchaser (e. g. R. 126, 127, 129). The petitioner loaned Roatche the necessary money (R. 131, 132 and 134); he had financed Roatche in other instances (R. 135, 140). This was all done, and Roatche repaid the money to the petitioner (R. 131).

Following acquittal in the OPA case, the petitioner was indicted for perjury in May, 1943. The indictment charged Weiler with having testified falsely under oath in that in the OPA case he testified to certain material matters which he did not believe to be true, and which he knew to be false. In particularly setting forth the false oath, the indictment went on to quote excerpts from the testimony described above. The excerpts included not only the Weiler assertion that he had not bought tires in March, 1942, but also his subsequent explanations, qualifications and statements that although he appeared as a purchaser in the United

Petroleum transaction, he nevertheless was not the real purchaser; that he had signed the order for the tires in question for the accommodation of Roatche, to whom he in effect advanced the purchase price of the tires as a loan, which loan was repaid to him by Roatche (R. 3-11). The indictment alleged that in so testifying Weiler knew the truth to be that he had purchased the tires in March, 1942, from United Petroleum; that he had accepted delivery of the tires; that he had paid for them; that he had not loaned the money for the purchase of the tires, and that he had not acted as an accommodation party in the transaction (R. 10-11).

At the trial of the perjury case the Government's evidence boiled down to this:

(a) Representatives of the United Petroleum testified that Weiler had purchased the tires from the Company (R. 41-45) and eight days later at the request of United Petroleum had written a letter so stating (R. 27, 147), so that United could show OPA that a competent person had purchased the tires (R. 28).

(b) Sweeney of United Petroleum testified that at Paulsboro, N. J., United Petroleum delivered the tires to Evans, employee of Weiler, who loaded them upon a truck which Sweeney had previously seen in and around Weiler's public garage (R. 41-45).

(c) Roatche testified that he was not involved in the tire transaction, and that Weiler did not loan him the money for it (R. 59-61), although admitting that he was with Evans when United delivered the tires to Evans (R. 61) and helped load the tires on the truck (R. 62); he went along because he had nothing else to do (R. 62).

For the defense Weiler repeated the story he had told in the OPA case (R. 73-91).

At the conclusion of the trial, defendant's counsel in writing requested the court to charge as follows:

> "(8) The Government must establish the falsity of the statement alleged to have been made by the defendant under oath, by the testimony of two independent witnesses or one witness and corroborating circumstances. Unless that has been done, you must find defendant not guilty" (R. 103).

The request was denied (R. 100) and not in any way covered or adverted to in the charge.

The jury brought in a verdict of guilty.

Motions in arrest of judgment (R. 166) and for a new trial (R. 151) were denied, and Weiler was sentenced to jail for a year and a day (R. 167). Weiler appealed to the Circuit Court of Appeals (R. 186), which affirmed (R. 204).

In affirming, Maris, J., who wrote the majority opinion, held that refusal of the trial judge to instruct the jury on the two-witness rule in perjury cases was not error; and further *that not only was it unnecessary so to instruct the jury, but that the instruction "would impede rather than aid them in reaching a right decision"*; that in effect a defendant was not entitled to such instruction under *any* circumstances, and that the requirements of justice would better be met by withholding rather than stating such instruction (R. 195-6).

Bard, J., in a concurring opinion (R. 200), based his concurrence principally on the opinion of the United States Supreme Court in the case of *Goins* v. *United States*, 306 U. S. 622, 59 S. Ct. 783, 83 L. Ed. 1027, *interpreting that decision to mean that under no circumstances was such a refusal to instruct* (upon the two-witness rule in perjury cases) *reversible error.*

Neither the majority nor the concurring opinion held the alleged error harmless or nonprejudicial.

Jones, J., dissenting (R. 201), furnished an analysis of the legal problem involved, and concluded that the refusal to grant the instruction requested was reversible error. In the last paragraph of his opinion, he pointed out the error was prejudicial, unlike the *Goins* case (R. 203-4).

Upon petition for certiorari, this court granted certiorari upon only the first of the questions stated to be involved (appellant's Petition for Writ of Certiorari p. 8). The said question involved reads as follows:

Is a defendant indicted for perjury *never* entitled upon request to have the trial court instruct the jury upon the so-called two-witness rule in perjury cases?

Assignments of Error

The Circuit Court of Appeals for the Third Circuit erred

1. In affirming the judgment of the District Court.

2. In holding that under no circumstances is a trial judge required upon request to instruct the jury as to the two-witness rule in perjury cases.

3. In holding that the Trial Judge in the case at bar did not commit reversible error in refusing, upon request, to instruct the jury upon the two-witness rule in perjury cases.

Specification of Such of the Assigned Errors As Are Intended to Be Urged

The petitioner intends to urge the following of the assigned errors:

The Circuit Court of Appeals for the Third Circuit erred

1. In affirming the judgment of the District Court.

2. In holding that under no circumstances is a trial judge required upon request to instruct the jury as to the two-witness rule in perjury cases.

3. In holding that the Trial Judge in the case at bar did not commit reversible error in refusing, upon request, to instruct the jury upon the two-witness rule in perjury cases.

Summary of Argument

1. It is reversible error for a trial judge to refuse a requested instruction to the jury upon the two-witness rule in perjury cases, except in cases where the refusal is harmless.

2. Since the two-witness rule is part of the applicable law in perjury cases, and since it is the duty of the court to instruct the jury as to the law of the case: it would appear that juries should be instructed on the two-witness rule, whether requested or not.

3. If the rule be rigorized by the requirement that the witnesses therein enumerated must be *credible*, then the inevitable consequence is that the jury must be instructed upon the rule.

4. The error in refusing to charge was prejudicial and harmful to the accused.

Foreword

This argument does not involve the nature or validity of the two-witness rule in perjury cases. The argument is restricted narrowly to the proposition that it is the duty of a trial judge to instruct the jury, *when so requested*, upon the so-called two-witness rule in perjury cases.

The rule has been formulated by this Court in *Hammer v. United States*, 271 U. S. 620, 626, 46 S. Ct. 603, 70 L. Ed. 1118, 1120, as follows:

> "The general rule in prosecutions for perjury is that the uncorroborated oath of one witness is not enough to establish the falsity of the testimony of the accused set forth in the indictment as perjury."

ARGUMENT

It Is Reversible Error for a Trial Judge to Refuse a Requested Instruction to the Jury Upon the Two-Witness Rule in Perjury Cases, Except in Cases Where the Refusal Is Harmless.

This portion of the argument is made upon the hypothesis that the refusal of the Trial Judge to charge as requested, if error, was *not* harmless error. That the error *was* harmful and prejudicial will be argued later in this brief; but the present portion of the argument can be crystalized better, and brought into better focus, if the prejudicial nature of the error is assumed at the outset.

This is so because the court below predicated its opinion upholding the conviction, upon the basis that *never under any circumstances* is a court required to inform the jury in its charge, whether requested or not, of the requirements of the two-witness rule in perjury cases.

The learned court below said in its opinion (R. 194):

> "We, therefore, must begin with the premise that in the federal courts no defendant may ordinarily be convicted upon a charge of perjury which is supported by the testimony of but a single witness. *It does not necessarily follow, however, that a defendant in a perjury case is entitled to have the jury instructed as to this rule of evidence. On the contrary not only historical considerations but practical considerations as well lead to the conclusion that the jury have no role to perform in its application.* * * *" (Italics supplied)

and again (R. 195):

> "When we turn to a consideration of the rule in its practical operation we likewise reach the conclusion that it should be considered as purely quantitative in nature and as *raising no question for the jury.* Considered from the standpoint of the jury's task the in-

> terjection of the rule into their deliberations *would impede rather than aid them* in reaching a right decision upon the sole issue with which they are concerned, the guilt or innocence of the defendant. * * *" (Italics supplied).

and further (R. 198):

> "Our consideration of the subject convinces us that the question whether the government has offered sufficient proof to meet the rule as to the quantum of proof required in a perjury case is and should be treated by the trial judge as *purely a rule of law to be applied by him* in determining whether the case should be submitted to the jury or a verdict of not guilty directed." (Italics supplied).

The court below, as is evident from the above excerpts from its opinion, boldly struck out upon a hitherto untrod path in the realm of the procedural application of the two-witness rule in perjury cases. A search by counsel has failed to reveal a single case where so revolutionary a departure has been upheld by any appellate court.

It is to be observed that the majority of the court below adhered to the principle thus enunciated, without any regard to the question whether failure to charge as requested was harmful or prejudicial to the accused.

Indeed Bard, J., came to the conclusion (erroneously we submit) that your Honorable Court's affirmance in the case of *Goins* v. *United States*, 306 U. S. 622, carried the implication that even where the failure to charge as requested was "highly prejudicial" to the defendant, no error has been committed: this, despite the language in the said affirmance, which was based specifically upon the proposition that the trial judge's failure to instruct upon the two-witness rule as requested "could not have prejudiced the petitioner (defendant) * * *."

An unbroken line of decisions by appellate courts in this country holds entirely otherwise.

The latest expression we have found in a state court is in the case of *State* v. *Hill*, 223 N. C. 711, 28 S. E. (2d) 100 (1943).

The court said at p. 102-103 of 28 S. E. (2d):

> "The defendant was convicted of perjury. His appeal challenges the sufficiency of the charge as an explanation of the law relating to that crime and its application to the facts. C.S. Sect. 564. In view of the nature of the crime and the restrictions which are thrown around the evidence which must be adduced to procure conviction, we are of the opinion that the objection is well taken. We do not find, on an inspection of the instructions, that the jury was advised that the defendant could not be convicted except upon the testimony of at least two credible witnesses or one such witness and corroborative circumstances."

and again at p. 104:

> "In this case, of course, we have no opinion as to the defendant's guilt or innocence. We have merely illustrated the application of the law. It is not necessary for the trial court, figuratively speaking, to throw the book at the jury; but a substantial explanation of the law as applied to the evidence is required, and we cannot regard a clear statement of the conditions on which the defendant may be convicted as a matter of subordinate elaboration. Nor can we hold that its inadvertent omission by the able and impartial judge who tried this case as cured by the fact that, numerically speaking, two witnesses were arrayed against the defendant. That belongs to the mechanics, not to the philosophy, of the law."

The following is from *Walker, et al.*, v. *Commonwealth*, 1[illegible] S. W. 109, 116 Ky. 111, 112 (1915):

> "Without discussing all the grounds urged for a new trial and now relied on for a reversal, it is sufficient to

say that the complaint that the circuit court failed to properly instruct the jury as to all the law of the case must be sustained. In other words, the trial court did not instruct the jury, as it should have done, that before they could convict either of the defendants in this case their guilt must be established beyond a reasonable doubt by the testimony of two witnesses, or of one witness and strong corroborating circumstances. This omission will compel the reversal of the judgment. As said in Goslin v. Commonwealth, 121 Ky. 698, 90 S. W. 223, 28 Ky. Law Rp. 683:

'This is an old rule of evidence, and therefore a rule of law, applicable to the rights of persons as well as to the rights of property. It is not merely a technical rule, but one of substantial justice, and founded upon a safe and wise public policy. Not only would it be unsafe, as it is sometimes said of it, that one man's oath in such matter should outweigh another's, which is possibly not entirely satisfactory, in view of the fact that it may do so in respect to property, or even life; but it is a matter of first importance in the administration of justice that witnesses should feel themselves safe in testifying to their own conception, recollection, and honest belief as to the facts forming the subject of inquiry in the courts. If it were so that one man could be convicted of perjury or false swearing by the oath alone of another who testifies to the contrary, the timid and the humble and obscure would not feel safe, and would not be safe, in giving their testimony, where it might be opposed by that of one of influence and prominence. It is right that the jury, or other tribunal trying the fact, should have the privilege of weighing the evidence, of discrediting one witness entirely, and believing another, according to the probability of the matter as it seems to them; but, if the law allowed that one man's oath might convict another of perjury or false swearing, the effect would be to deter the timid and obscure person, and to that extent retard the administration of pure justice. It would deprive the court or jury in many instances of a full hearing from all who might

> have knowledge as witnesses of the facts being tried. * * * This wise old rule of the common law is one which this court has always recognized and enforced. It applies alike to prosecutions for false swearing and perjury; for those offenses are alike, and the principles and policy of the law applicable to one, save wherein modified by statute, apply to the other. Commonwealth v. Davis, 92 Ky. 460, 18 S. W. 10, 13 Ky. Law Rep. 676.' "

As far back as 1889, it was held by the Court of Appeals of Texas, in *Wilson* v. *State*, 10 S. W. 749, 750; 27 Tex. Crim. R. 47, 49, that it was fundamental error to fail to give an instruction upon the two-witness rule, since under the code of criminal procedure it was imperative in felony cases that the courts "shall distinctly set forth the law applicable to the case, whether asked or not." The failure to charge was held a "fatal omission."

The court's statement in the *Texas* case that the two-witness rule is a fundamental part of the law in a charge of perjury and that, therefore, an instruction should be given whether asked or not, is worthy of note. So fundamental is the two-witness rule in perjury cases, that to say it is part of the law of the case is but to state a truism. Since as a general proposition the very function of the court's instruction to a jury is to give them the law of the case, it would appear that the Texas Court stated a profound truth in holding that the instruction should be given even without request.

The following language is from *State* v. *Rutledge*, 79 Pacific 1123, 1124; 37 Wash. 523, 528 (1905):

> "The respondent concedes the principle of law embodied in the foregoing request, but claims it was not error to refuse such request in this case for the reason that there were in fact more than one witness, and cites Montgomery v. State, 40 S. W. 805, from Texas, as sustaining this contention. The case cited does not

> sustain the doctrine contended for. On the contrary, the courts of Texas have held in numerous cases that the omission to instruct the jury that a conviction of perjury cannot be had on the testimony of a single witness is reversible error."

Other cases enunciating the same principle are collected in the footnote.[2]

Text Authorities

To the same effect are the following statements from texts:

48 C. J. 909, Perjury, Sec. 184:

"The court should instruct the jury as to the degree of proof and the number and corroboration of witnesses required to support a conviction for perjury, * * * The necessity for a charge that the falsity of the oath must be proved by two witnesses or by one witness and corroborating circumstances is not obviated by the fact that more than one witness testified to the perjury, * * *"

The following is from 41 Am. Jur. 40, Perjury, sec. 72:

"The court should inform the jury of the material facts that must be established to sustain a conviction and as to the number and corroboration of witnesses required to support a conviction for perjury."

Wigmore on Evidence, Second Edition, Vol. 4, page 325, states:

> "The jury should be instructed not to convict unless the testimony of the principal witness has been so cor-

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[2] *Madden* v. *State*, 223 Pacific 716, 26 Okl. Crim. 251, (1924); *Clower* v. *State*, 236 S. W. 265, 151 Ark. 359 (1922); *Brown* v. *State*, 276 S. W. 929, 101 Tex. Crim R. 639 (1925); *Knight* v. *State*, 158 S. W. 543, 71 Tex. Crim. R. 36 (1913); *Saucier* v. *State*, 48 So. 840, 95 Miss. 226 (1909); *Wadlington* v. *Commonwealth*, 59 S. W. 851, 22 Ky. L. 1108 (1900); *Goslin* v. *Commonwealth*, 90 S. W. 223, 121 Ky. 698 (1906); *State* v. *Heed*, 57 Mo. 252 (1874); *Holt* v. *State*, 89 S. W. 838, 48 Tex. Crim. R. 559 (1905).

roborated that they believe it to be true beyond a reasonable doubt."

Cases Distinguished

In *O'Leary* v. *United States*, 158 Fed. 796, where the refusal to charge was held not reversible error, the case was decided in effect upon the principle that the error was harmless because the perjury had been indubitably proven by records; the real issue being apparently only one of intent or forgetfulness on the part of the accused, and not in any sense as to anything to which the corroborative proofs were related.

In *Manning* v. *State*, 127 S. E. 475, 33 Ga. App. 610 (1925), it was held that the court should have given the requested instruction on the two-witness rule, but that the conviction should not be reversed since the error was harmless.

We have cited the last two cases in order that your Honorable Court may have before it the benefit of all our search; but it is patent that those cases do not affect the principle for which the petitioner contends.

An examination of all the above listed authorities discloses an uninterrupted line of cases holding that the accused is entitled to have the jury instructed on the two-witness rule. Some cases went so far as to declare that it is reversible error to omit the instruction, whether requested or not. Another case characterized the omission as fatal.

The very number of the cases, and their uniform rationale, should be persuasive in upholding the petitioner's contention that the learned court below erred in departing from the rule to which those cases, whether recent or of more ancient vintage, have so consistently adhered.

The Authorities in the Federal Courts

Goins v. *United States*, 99 Fed. (2d) 147 (the case upon the affirmance of which Bard, J., relied for his concurring opinion in the court below) lends support to the petitioner's contention. The court there said, pp. 148-9:

> "On the second point it may be assumed that the requested instruction embodied correctly the rule of law as applied in the federal courts, where it has been uniformly held that the uncorroborated oath of one witness is not enough to establish the falsity of the oath as to which perjury is charged, and that, except where the falsity of such oath is indisputably established, as by documentary evidence, it must be shown by the testimony of at least two witnesses, or by the testimony of a witness corroborated by circumstances proved by independent testimony. *And it may be assumed also that ordinarily the defendant is entitled to have the jury so instructed.*" (Italics supplied.)

In *Pawley v. United States*, 47 Fed. (2d) 1024, 1026, the 9th Circuit said, after quoting the two-witness rule from the case of *Hammer v. U. S.*, 271 U. S. 620, 46 S. Ct. 603, 70 L. ed. 1118:

> "In a proper case, therefore, it is the duty of the court to give an instruction embodying this principle of law, if timely requested."

And to the same effect is *Allen v. United States*, 194 Fed. 664, 668.

Such unanimity of opinion in courts of different juristions is by no means to be found in all phases of the law. The existence of that unanimity in the phase of the law under discussion argues the existence of compelling underlying reasons: and, conversely, furnishes ground for the petitioner's position that the abrogation of the rule by the learned court below constitutes reversible error.

There is nothing esoteric or recondite in the reasons underlying the rule. We quote only part of Mr. Best's language as it appears in Wigmore on Evidence, Second Edition, Vol. 4, page 322:

> "The foundations of this rule, we apprehend, lie much deeper. The legislator dealing with the offence of perjury has to determine the relative weight of conflicting duties. Measured merely by its religious or moral enormity, perjury, always a grievous, would in many cases be the greatest of crimes, and as such be deserving of the severest punishment which the law could inflict. But when we consider the very peculiar nature of this offence, and that every person who appears as a witness in a court of justice is liable to be accused of it by those against whom his evidence tells, who are frequently the basest and most unprincipled of mankind; and when we remember how powerless are the best rules of municipal law without the cooperation of society to enforce them—we shall see that the obligation of protecting witnesses from oppression, or annoyance, by charges, or threats of charges of having borne false testimony, is far paramount to that of giving even perjury its deserts."

We respectfully refer your Honorable Court to Wigmore for the balance of the excerpt from Best's Evidence, which is somewhat too lengthy for reproduction here.

Upon both principle and authority, therefore, it would seem that the Trial Judge's failure to charge as requested was reversible error.

The Witness Referred to in the So-called Two-Witness Rule Must Be Credible Witnesses

Another facet of the two-witness rule requires examination here.

Some of the courts apply the rule with even greater rigor. They add to the requirements adopted by all courts, the further requirement that the witnesses enumerated in the rule must be *credible* witnesses.

Before citing the authorities for this statement, it would be well to study the implication of this added requirement.

If the rule be weighted by the added requirement that the witnesses must be credible, then the conclusion at once follows that failure to instruct upon the rule is error.

For, if the rule renders indispensible not only the prescribed number of witnesses, but also the factor of credibility on the part of those witnesses: then only a jury may adjudge the witnesses credible or not: such being inherently a jury's, and not a judicial, function.

Since, in the philosophy of our legal system, the province of the trial judge is more or less sharply marked off from that of the jury: and since it would hardly be disputed that the credibility of witnesses comes within the province of the latter and not of the former: it must follow that if the jury cannot convict unless the minimum number of witnesses in a perjury case be held by them credible, then they must be informed of the rule so that their deliberations may include that factor. If, therefore, credibility be a *sine qua non*, then the error in the language of the opinion of the learned court becomes more striking—that is to say, the language to the effect that the instruction on the two-witness rule would deter the jury rather than aid them in reaching a proper verdict.

The Authorities on the Credibility Rule

Jones, J., dissenting below, stressed the importance that the witnesses be, not merely witnesses, but *credible witnesses*, in the following language (R. 202).

> "The question then is whether the rule is merely quantitative as to the number of witnesses to be produced by the prosecution or must the jury believe two witnesses or one witness and corroborating circumstances before guilt may be found. In his work on Evidence (Third Ed.) Vol. VII at Sect. 2038, Wigmore

says in discussing the proof required to support a charge of treason,—

> '(3) The rule of two witnesses means, by reason of the general principle * * * that they must be effective witnesses, i. e., they must both be believed by the jury. A rule requiring a certain quantity of evidence is binding upon the jurors as well as upon the judge; they are not to convict unless in their judgment the required amount exists. If the testimony of one is rejected by the jury upon consideration, there remains but one witness,—less than the rule requires.'
>
> Nor do I think any distinction is relevantly to be drawn because the requirement as to the quantum of proof in treason cases is constitutionally prescribed. Our present concern is as to when the requirements of the two-witness rule can be said to have been met. That question can just as pertinently arise in a trial for perjury as it can in a trial for treason. The inquiry is whether the jury, in order to convict, must find the evidence credible to the extent of the quantity of proof which the law requires. I think it must. If the answer were otherwise, the rule would prove in practice to be but an empty form."

And we respectfully refer your Honorable Court to the paragraph of Judge Jones' dissenting opinion following the excerpt just quoted.

Judge Jones occupies no isolated position in his construction of the rule with regard to the requirement of credibility.

State v. *Hill*, 223 N. C. 711, 28 S. E. (2d) 100, held that the jury must be instructed that the defendant could not be convicted "except upon the testimony of at least two *credible* witnesses or one such witness and corroborative circumstances." (Italics supplied.)

Brown v. *State*, 276 S. W. 929, 931, 101 Tex. Crim. R. 639, 644 (1925), went further:

> "Where the state relies on two witnesses only, and one is assailed, it has also been held error to refuse an

instruction that, if the jury believe the party so assailed was not a credible witness, they should acquit. Kitchen v. State, 29 Tex. Crim. App. 45, 14 S. W. 392."

In *Clower* v. *State*, 236 S. W. 265, 266, 151 Ark. 359 (1922), it was also held that the witnesses in perjury cases must be *credible* witnesses; and for error in failure to give a proper requested instruction to that effect the conviction was reversed and a new trial granted.

To the same effect is *Madden* v. *State*, 223 Pacific 716; 26 Okl. Crim. 251 (1924). There a conviction was reversed because the instruction on the two-witness rule spoke only of witnesses and not of "credible witnesses."

Upon the authority of the cases cited, therefore; by reason of the analogy in the requirements of proof as between treason and perjury cases; and upon the lucid and forceful exposition in the dissenting opinion by Jones, J., below, it is respectfully urged that the trial court committed error in refusing the request to charge upon the two-witness rule.

The Error (in Refusing to Charge) was Prejudicial and Harmful to the Accused

It can hardly be questioned that the refusal of the trial judge to charge as requested, if error, was not harmless error.

Jones, J., dissenting below, said so specifically in his dissenting opinion.

Bard, J., concurring below, implied as much in his concurring opinion.

The import of the majority opinion below by Maris, J., was that the accused is not under any circumstances entitled to a charge: whence the implication follows, either that in the eyes of the law the omission to charge can never be construed as prejudicial, or that it does not matter whether the failure to charge be prejudicial or not.

That opinion states (R. 198):

> "Certainly, if the jury have any function to perform under such instructions, the performance of which might conceivably lead to the acquittal of the defendant rather than his conviction, the refusal of the instructions could hardly be said not to prejudice his rights."

Jones, J., had this to say concerning the prejudicial effect of the failure to charge:

> "Nor may the trial error, thus indicated, be overlooked as not having been prejudicial. The evidentiary situation in the instant case differed materially from that presented in the Goins case. Here, one witness testified in corroboration of the principal witness and two more testified to later admissions by the defendant. If the jury believed none but the principal witness, then their verdict rested on less than what the law requires. That they did believe more than one witness is not to be inferred from the verdict in the absence of any instruction as to the quantity of proof required for the establishment of the defendant's guilt" (R. 203).

An examination of the structure of the case, as it was presented to the jury, leads to the same conclusion as that reached by Jones, J.

Whether or not Weiler had committed perjury depended upon the question was Weiler only the nominal purchaser for Roatche's benefit, or was he the actual purchaser. This in turn depended upon the factual question whether he had loaned the money to Roatche for the purchase of the tires.

If in truth Weiler were merely financing the transaction, if he were the nominal purchaser only, if he loaned the money to Roatche and Roatche repaid him, then Weiler was not testifying falsely in stating that he did not purchase tires in March of 1942.

But the only witness for the Government in the trial of the perjury case *who testified that no loan was made* was

Roatche. On this point, the proofs boil down to oath against oath—Roatche's against Weiler's. It is to be observed that other testimony for the Government related only to the order given by Weiler for the purchase of the tires, and the delivery of the tires to Evans at Paulsboro, New Jersey—not Weiler's place of business: (R. 46, 47). Such other testimony had no probative value with regard to the point at issue, for Weiler conceded freely at the O. P. A. trial that he had given the order. This testimony could not by its nature resolve the question whether Weiler was the actual or only the nominal purchaser. Thus, the requirements of the two-witness rule were not satisfied, there being no corroboration of the point mentioned; and the error in failing to instruct on the rule was prejudicial.

Even assuming arguendo that the required quantum of proof was present in the case as presented to the jury, there is still no way of telling whether the jury believed more than one of the witnesses. No legal machinery exists for the determination of such a question

But: if the jury convicted believing the testimony of only one witness to the perjury, then the requirements of the rule have not been met, and the defendant stands improperly convicted. Here lies the vice of the refusal to instruct: had the requested charge been given the problem would not arise.

* * * * * * * *

We take the liberty of bringing the following to the attention of your Honorable Court.

In the case of *Goins* v. *United States*, 306 U. S. 622, this Court affirmed a conviction where the court had failed and refused to charge the jury upon the two-witness rule, in the following language:

> "As it appears on hearing argument that the District Court's failure to give Instruction B could not have prejudiced the petitioner, * * *".

In other words, this Court refused to reverse in the *Goins* case because the error was harmless. But Bard, J., concurring below, took the *Goins* case to mean that a court need never charge the jury upon the two-witness rule in perjury cases; because, in his (Judge Bard's view), any failure so to charge must *always* be highly prejudicial; and since this Court had said "the failure to give the requested instruction did not prejudice the defendant", it must follow that the Goins decision means that a jury need *never* be instructed upon the rule (R. 200).

It is perfectly clear from the entire tenor of Judge Bard's concurring opinion that his concurrence was based upon the *Goins* case and his construction thereof: and had it not been for such construction he in all probability would have voted to reverse the conviction. Since Jones, J., dissented below, the result would have been a reversal.

* * * * * * *

For the reasons given, it is respectfully contended that the judgment of the lower court should be reversed and a new trial granted.

Respectfuly submitted,

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Attorneys for Petitioner.

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No. 340

In the Supreme Court of the United States

OCTOBER TERM, 1944

LEE F. WEILER, PETITIONER
v.
UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the circuit court of appeals (R. 190–200), and the concurring and dissenting opinions (R. 200, 201) are reported at 143 F. (2d) 204.

JURISDICTION

The judgment of the circuit court of appeals was entered May 31, 1944 (R. 204), and a petition for rehearing (R. 205–219) was denied July 10, 1944 (R. 225). The petition for a writ of certiorari was filed August 12, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether, in a prosecution for perjury, the trial court committed reversible error in refusing to charge, as requested by petitioner, that the Government must establish the falsity of petitioner's statement by the testimony of two independent witnesses or one witness and corroborating circumstances.

2. Whether petitioner's allegedly perjurious testimony was material to the question under inquiry in the proceeding in which such testimony was given.

STATUTE INVOLVED

Section 125 of the Criminal Code (18 U. S. C. 231) provides:

> Whoever having taken an oath before a competent tribunal, officer, or person, in any case in which the law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, shall willfully and contrary to such oath state or subscribe any material matter which he does not believe to be true, is guilty of perjury, and shall be fined not more than $2,000 and imprisoned not more than five years.

STATEMENT

On May 12, 1943, petitioner was indicted in the District Court of the United States for the Eastern District of Pennsylvania for having testified falsely under oath to certain material matters in a prior criminal proceeding (R. 3a–11a). A verdict of guilty was returned by the jury (R. 104a), and petitioner was sentenced to imprisonment for a term of one year and one day (R. 167a). Upon appeal to the Circuit Court of Appeals for the Third Circuit, the conviction was affirmed (R. 190–200), with one judge concurring (R. 200–201) and another dissenting (R. 201–204).

The evidence adduced by the Government at the trial may be summarized as follows:

Petitioner, chairman of a local rationing board (R. 119a, 128a), and one Evans, manager of petitioner's garage (R. 80a), were tried in a prior case, in March 1943, in the District Court of the United States for the Eastern District of Pennsylvania (R. 115a) on a charge of making improper sales, keeping false records, and failing to make reports as to new rubber tires and tubes, in violation of regulations issued by the Office of Price Administration (R. 74a, 105a–111a). Petitioner was acquitted (R. 74a).

At the earlier trial petitioner testified under oath concerning his failure to file a quarterly report on or before December 31, 1941, as required by regulations of the Office of Price Administration (R. 42a, 121a), showing the inventory of tires and tubes in his possession as of December 12, 1941 (R. 111a, 119a). He stated that he did not file such a report because it was due on or before December 31, 1941, and that he did not receive the necessary form until January 5, 1942, when it was too late to be filed (R. 3a–4a; 120a, 121a). Upon being asked whether he filed a report for the following period, due on March 31, 1942, petitioner replied that he did not, explaining that he had not purchased, nor had any tires in stock during such period (R. 4a; 121a–122a). Petitioner was then confronted with a letter sent by him to the United States Petroleum Corporation (hereafter referred to as the Corporation), dated March 24, 1942, in which he stated over his notarized signature that he had purchased 170 tires from the Corporation on March 16, 1942 (R. 5a; 124a, 147a–148a). Petitioner admitted the authenticity of the letter (R. 5a–6a, 124a, 125a–126a, 137a), but denied that he had actually purchased or received the tires (R. 4a, 7a, 8a, 9a; 125a, 129a, 130a, 132a, 134a). In explanation of the transaction and his written admission that he had purchased the tires, petitioner testified in substance that while he ordered the tires, he never received them (R. 125a; Pet. p. 16); that the tires were in fact purchased by one Roatche (R. 8a, 130a–131a), to whom he lent money for the purpose (R. 7a–10a; 128a, 131a, 133a, 134a, 135a); and that he signed the March 24 letter stating that he had purchased the tires from the Corporation in order to accommodate one Sweeney, manager of the Corporation's tire department (R. 41a, 45a), who was involved in the transaction (R. 6a–9a, 126a, 128a, 130a–132a, 141a, 142a, 146a).[1]

At the trial in the case at bar, Sweeney testified that in March 1942 the Corporation was liquidating its tire department (R. 41a); that he persuaded petitioner to purchase the tires in question (R. 41a–42a); that they agreed as to the price and petitioner gave him a written order for the tires (R. 43a, 49a–50a, 58a, 147a); and that petitioner stated he would send his truck for them (R. 47a). Sweeney testified further that subsequently Evans, the manager of petitioner's garage (R. 80a), called for the tires in a truck which had been used previously by petitioner's employees, received the tires, and paid for them in cash (R. 43a, 47a, 48a). He identified an official record of the Corporation showing the sale of the tires to petitioner's concern, the Brewerytown Garage (R. 27a, 43a, 58a–59a, 148a), and categorically denied that he (Sweeney) purchased the tires or invested any money in them, that he received the tires, or that the transaction was handled by him in any way except in his official capacity and on behalf of the Corporation (R. 44a, 45a, 50a–51a). Roatche, a friend of Sweeney (R. 47a, 62a), testtified that Sweeney had informed him of the proposed liquidation of the Corporation's tire department and asked him whether he knew of "a legal outlet" for the tires, whereupon Roatche mentioned petitioner (R. 60a); that Sweeney and Roatche visited petitioner, and negotiations between the parties culminated in petitioner's purchase of the tires (R. 60a, 61a); that subsequently Roatche rode with Evans on the truck from the Brewerytown Garage to the Corporation's premises (R. 62a, 64a), was present at the receipt of the tires by Evans (R. 60a, 61a, 62a), helped him load them on the truck (R. 62a), and drove with Evans back to Philadelphia (R. 60a). Roatche testified also that he did not purchase the tires (R. 59a, 61a); that he received no loan or money from anyone for their purchase (R. 60a, 61a); and that the tires were not delivered to him (R. 60a, 64a).

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[1] The full testimony which petitioner gave in this respect is set forth in the indictment (R. 3a–10a) and in Government's Exhibit 2 (R. 116a–146a).

Gabel, president of the Corporation (R. 26a), testified that, upon learning of the sale of the tires to petitioner, he sent for petitioner and, stating that he understood the sale and delivery of the tires already had been made to him (R. 27a–28a, 30a; see also 33a), asked petitioner for a letter on petitioner's stationery to the effect that petitioner "was competent under the Act to buy those tires" (R. 27–28a; see also 30a, 31a). Gabel threatened to report the transaction to the Office of Price Administration or recall the tires unless the letter were received (R. 28a), and subsequently sent a notary to petitioner's office to obtain such a letter (R. 28a). Oates, the office manager of the Corporation, a notary public (R. 33a), testified that he witnessed petitioner affix his signature to the letter of March 24, which he then notarized (R. 34a–35a).

ARGUMENT

1. Petitioner asserts that the trial court committed reversible error in refusing to instruct the jury that the falsity of the statements made by petitioner in the earlier proceeding must be established by the testimony of two independent witnesses or one witness and corroborating circumstances (Pet. 6–7, 8–9, 12–16). We submit that this contention is without merit.

It may be conceded that the requested instruction embodied the rule generally followed in the federal courts in perjury cases. See *Hammer* v. *United States*, 271 U. S. 620, 626–627; Wigmore, *Evidence* (3d ed.), Vol. VII, Secs. 2030–2034. Pretermitting the question whether this rule should be modified to permit a conviction to be based upon the testimony of one witness, as was urged in the Government's brief in *Goins* v. *United States*, 306 U. S. 622 (Brief, pp. 13–14, 16–40), the issue here is whether petitioner was prejudiced by the trial court's refusal to give the jury the requested instruction. It is clear, we think, that here, as in the *Goins* case, the trial court's failure to give such an instruction could not have prejudiced petitioner.

The allegedly perjurious testimony included not only petitioner's assertion that he did not file the March 1942 quarterly report because he had not purchased any tires during that month, but also his explanation of the transaction referred to in his letter of March 24 (R. 147a–148a). Witnesses Sweeney and Roatche testified to the utter falsity of petitioner's statements at the earlier trial. Their testimony was corroborated by that of Gabel and Oates (*supra*, pp. 6–7). Moreover, the signed and notarized statement that he had purchased the tires in March 1942, which was introduced in evidence, constituted a documentary writing emanating from petitioner himself. In finding petitioner guilty, the jury must have disbelieved petitioner's testimony that he filed no report in March because he had no tires and purchased none; in so concluding, the jury necessarily must have found petitioner's explanation of the transaction also to be false. Since the testimony of Sweeney and Roatche coincided as to those material matters, and was reinforced by petitioner's written, signed statement and by the corporation's record, it is plain that the jury credited their testimony, the corporation's record, petitioner's written statement, as well as the testimony of witnesses Gabel and Oates concerning the statement.

Not only did the Government produce more than the minimum quantum of evidence necessary to satisfy the rule, but in view of the introduction of the written statement signed by petitioner, the Government probably could have predicated its entire case upon that document alone. See *United States* v. *Wood*, 14 Pet. 430. It is inconceivable that the jury could have believed only Sweeney or Roatche and not the other two, or could have accepted the testimony either of Gabel or Oates without believing the other. Even assuming, *arguendo*, that only Sweeney or Roatche was believed, their testimony was corroborated by the letter of March 24. This evidence was well within the requirements of the rule. Clearly, therefore, petitioner was not prejudiced by the trial court's refusal to give the requested instruction. Cf. *Goins* v. *United States, supra; O'Leary* v. *United States*, 158 Fed. 796 (C. C. A. 1); *Pawley* v. *United States*, 47 F. (2d) 1024 (C. C. A. 9).

2. Petitioner asserts (Pet. 8, 9, 12, 18–19) that the testimony forming the basis for the perjury indictment was not material to the earlier trial, and that, consequently, the perjury indictment was not well grounded. There is no merit to this contention. The question of materiality was for the trial court. *Sinclair* v. *United States*, 279 U. S. 263, 298; *Travis* v. *United States*, 123 F.

(2d) 268, 270 (C. C. A. 10), and cases cited. Both the trial court and the circuit court of appeals upon review (R. 190–193) concluded that the testimony in question was material. Specifically, petitioner's testimony as to his failure to file the March 1942 report and his explanation for his failure to file that report, as well as his contradiction of the statements in his letter of March 24, were given in connection with his explanation of his failure to file the December 1941 report, which was a matter wholly within his knowledge requiring the jury to place reliance upon his testimony, as it apparently did in acquitting him. While the March 1942 incidents were not directly within the scope of the indictment, they tended to throw light upon petitioner's December 1941 activities and had a direct and probably crucial bearing upon his credibility and the truth of his advanced explanations and justifications for the prior activities for which he was indicted. The testimony was thus plainly material. See, e. g., *Goins* v. *United States*, 99 F. (2d) 147 (C. C. A. 4), certiorari granted, 306 U. S. 623, certiorari dismissed, 306 U. S. 622; *Blackmon* v. *United States*, 108 F. (2d) 572, 573 (C. C. A. 5); *Claiborne* v. *United States*, 77 F. (2d) 682 (C. C. A. 8); *Luse* v. *United States*, 64 F. (2d) 776, 777 (C. C. A. 9); *United States* v. *McGovern*, 60 F. (2d) 880 (C. C. A. 2); *Carroll* v. *United States*, 16 F. (2d) 951 (C. C. A. 2); *United States* v. *Shinn*, 14 Fed. 447, 453 (C. C. D. Ore. 1882);

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3. Petitioner complains that the indictment is based not only upon the "contradictory statements of the defendant, but also the qualifications and explanations accompanying them" (Pet. 9), relying upon an alleged conflict with *Fotie* v. *United States*, 137 F. (2d) 831, 840 (Pet. 9, 16–18). Petitioner apparently misconstrues the ruling in the *Fotie* case, which merely held that the evidence there introduced was insufficient to sustain the indictment (see 137 F. (2d) at 840).[2] In the case at bar, petitioner's so-called qualifications and explanations of his March 24 written statement as to his purchase of the tires were

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[2] In that case, based upon an indictment charging perjury in the course of a hearing on a private bill to legalize the defendant's entry into the United States, the court stated (137 F. (2d) at 840):

> "* * * there is no evidence to contradict appellant's testimony in this record. * * * The only evidence * * * is the proof of prior inconsistent admissions and contradictory statements of the appellant. But in proving these admissions, the Government also proved the qualifications and explanations which accompanied the great majority of them * * *."

false, and themselves form part of the basis for the indictment (R. 3a–10a; *supra*, pp. 3–5). Those qualifications and explanations were, consequently, properly included in the indictment. Cf. *Travis* v. *United States*, 123 F. (2d) 268 (C. C. A. 10), and cases cited; *Woolley* v. *United States*, 97 F. (2d) 258 (C. C. A. 9); *Claiborne* v. *United States*, 77 F. (2d) 682 (C. C. A. 8); *Berry* v. *United States*, 259 Fed. 203 (C. C. A. 9)). It is settled, of course, that the several assignments of perjury may be set forth in a single count and that conviction will be sustained if any one of such assignments is proved. *United States* v. *Mascuch*, 111 F. (2d) 602 (C. C. A. 2), certiorari denied, 311 U. S. 650; *United States* v. *Otto*, 54 F. (2d) 277, 279–280 (C. C. A. 2); *Claiborne* v. *United States*, 77 F. (2d) 682, 687, 691–692 (C. C. A. 8); *Clayton* v. *United States*, 284 Fed. 537, 539 (C. C. A. 4); Wharton's *Criminal Law* (12th ed.), Vol. II, Sec. 1567.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 340

LEE F. WEILER, PETITIONER
v.
UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion in the Circuit Court of Appeals of Circuit Judge Maris (R. 190–200), the concurring opinion of District Judge Bard (R. 200–201), and the dissenting opinion of Circuit Judge Jones (R. 201–204) are reported in 143 F. (2d) 204.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on May 31, 1944 (R. 204), and a petition for rehearing (R. 205–219) was denied on July 10, 1944 (R. 225). The petition for a writ of certiorari, filed on August 12, 1944, was, with the limitation hereinafter indicated, granted on October 9, 1944 (R. 226). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court on May 7, 1934.

QUESTION PRESENTED

The order allowing certiorari limits review to the question "stated as Question 1 in the respondent's brief" (R. 226), to wit:

> "Whether, in a prosecution for perjury, the trial court committed reversible error in refusing to charge, as requested by petitioner, that the Government must establish the falsity of petitioner's statement by the testimony of two independent witnesses or one witness and corroborating circumstances."

STATUTE INVOLVED

The Federal perjury statute (Section 125 of the Criminal Code; 18 U. S. C. 231) provides:

> Whoever having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, shall willfully and contrary to such oath state or

> subscribe any material matter which he does not believe to be true, is guilty of perjury, and shall be fined not more than $2,000 and imprisoned not more than five years.

STATEMENT

An indictment for perjury was returned against the petitioner in the United States District Court for the Eastern District of Pennsylvania charging that, in a recent criminal proceeding against him and one other, the petitioner had willfully testified falsely under oath to certain material matters (R. 3a–11a). In the earlier case, which resulted in acquittal, the petitioner had been charged, among other things, with making prohibited sales of rubber tires and tubes under false invoices and with willful failure to file an inventory of tires and tubes on or before December 31, 1941, as required by the Office of Production Management and the Office of Price Administration (R. 74a, 105a–111a). The perjury indictment sets forth testimony of the petitioner at the trial of the earlier case, that he had not filed an inventory of tires for the first three months of 1942[1] because he had had no tires at that time; and that although he had signed a notarized letter, dated March 24, 1942, referring to himself as having purchased 170 tires on March 16, 1942, he had merely financed the purchase of these tires for someone else (R. 4a–10a). The indictment alleges that the petitioner gave this and related testimony knowing it to be false (R. 10a).

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[1] The materiality of this testimony in an inquiry about the petitioner's failure to file in 1941 is explained in Judge Maris' opinion below (R. 192). This question is outside the scope of review specified in the order allowing certiorari.

At the trial in this case, the petitioner's testimony at the earlier trial relating to his failure to file an inventory in 1942 was introduced in evidence. This included an admission that he had signed the letter of March 24, 1942 (R. 126a–127a); a denial that he had ever received the tires (R. 127a); an assertion that he had acted merely as a financier and go-between, the real parties in interest being a tire dealer named Roatche and one Sweeney, manager of the corporation which had offered the tires for sale (R. 131a); and a profession of complete ignorance of a letter signed "Bob Hastings" purporting to order the tires for the petitioner's concern. Testifying in his own behalf, the petitioner gave substantially the same evidence (R. 73a–91a), although there are new discrepancies in his statement of the amount of money which he claimed to have loaned (R. 77a, 83a, 85a, 89a) and in his reference at one point to Roatche and Sweeney (R. 76a–77a) and at another to Roatche alone as the borrower (R. 77a, 86a–89a).

Sweeney testified that in March, 1942, United States Petroleum Corporation was liquidating its tire department, of which he was manager; that it was to the financial advantage of the company to sell the tires rather than to return them to the manufacurer; that he had persuaded the petitioner, who was authorized to buy the tires in question, to buy them; that he and the petitioner had agreed upon the price; that the petitioner had given him a written order, dated March 16, 1942, for the tires (R. 41a–43a, 49a–50a, Govt. Ex. 3, R. 54a, 58a, 147a); and that the petitioner had stated that he would send his truck for the tires (R. 47a). Sweeney testified further that Evans, manager of the petitioner's garage (R. 80a), called for the tires in the truck which had previously been used by the petitioner's employees, loaded the tires on the truck, and paid for them in cash (R. 43a, 47a, 48a), receiving in return a receipted bill showing the sale of the tires to the petitioner's concern for a total price of $1,248.73 (R. 43a–44a, Govt. Ex. 5, R. 37a, 148a). Sweeney categorically stated that he had not purchased the tires or invested any money in them; that he had not received the tires; that he had made no private arrangement with the petitioner in respect of the tires; and that he had had no interest in the transaction other than his official one as manager of the tire department (R. 44a–45a, 50a–51a).

Roatche testified that Sweeney had informed him of the proposed liquidation of the corporation's tire department and asked him whether he knew of "a legal outlet" for the tires; that Roatche had thereupon suggested the petitioner; that

Sweeney and Roatche had visited the petitioner who had agreed to buy the tires from Sweeney's corporation; that subsequently Roatche had ridden with the petitioner's manager, Evans, when Evans called for the tires; and that Roatche had been present when Evans received the tires, had helped him load them on the truck, had driven back to Philadelphia with Evans, but had alighted at his own place of business before the tires were delivered (R. 60a–62a, 64a). Roatche testified that he had not purchased the tires (R. 59a, 61a); that he had received no loan from the petitioner for their purchase (R. 60a–61a); and that the tires had not been delivered to him (R. 60a, 64a). He also professed ignorance of the "Bob Hastings" letter (R. 62a; see also R. 65a).

Gabel, president of United States Petroleum Corporation (R. 26a), testified that, upon learning of the sale of tires to the petitioner, he had sent for the petitioner and asked him for a letter to the effect that the petitioner "was competent under the Act to buy those tires" (R. 27a–28a, 30a, 31a). Gabel sent a notary to the petitioner's office to obtain such a letter (R. 28a). Oates, office manager of United States Petroleum Corporation, a notary public, testified that he had witnessed the petitioner affix his signature to the letter of March 24, and had then affixed his signature and seal as a notary (R. 33a–35a, Govt. Ex. 4, R. 147a–148a).

In submitting the case to the jury, the District Judge, after reviewing the contentions of the Government and of the petitioner, stated (R. 98a–99a):

> * * * He [the petitioner] says that it was a transaction in which he was not the real party becoming the purchaser of the tires, but that they were purchased through an arrangement in which he loaned the money. If you find, of course, that that was the condition governing this transaction it would seem that the defendant did not testify falsely on his first trial.
>
> On the other hand if you find that the Government's contention is true, that he did purchase the tires, and it was his transaction, then it would naturally follow that the defendant testified falsely on the trial in March, 1943.

Among other instructions to the jury, the petitioner requested the following (R. 103a):

> The Government must establish the falsity of the statement alleged to have been made by the defendant under oath, by the testimony of two independent witnesses or one witness and corroborating circumstances. Unless that has been done, you must find the defendant not guilty.

The judge's charge included instructions on the presumption of innocence, the necessity of finding the defendant guilty beyond a reasonable doubt, and the jury's right to determine the credibility of the witnesses, including the defendant

(R. 99a–100a); but it did not include the petitioner's requested instruction as to the quantum of evidence (R. 100a–101a).

The jury returned a verdict of guilty (R. 104a), and the petitioner was sentenced to imprisonment for a term of a year and a day (R. 167a). Upon appeal to the Circuit Court of Appeals for the Third Circuit, the conviction was affirmed, one judge dissenting (R. 190, 200, 201, 204). In the opinion of the Court, Judge Maris expressed the view that the rule that perjury must be proved by the testimony of two witnesses or of one witness and corroborating circumstances is a rule of law to be applied by the judge in determining whether the case should be submitted to the jury and, hence, not a proper subject for an instruction to the jury. The Government's evidence, in his opinion, met the quantitative test (R. 190–200). Judge Bard's concurring opinion expressed the view that the decision of this Court in *Goins* v. *United States*, 306 U. S. 622, establishes "that after the required quantum of evidence has been submitted to the jury, it is the function of the jury to determine the guilt or innocence upon all the evidence, and a defendant so convicted has no ground for reversal" (R. 200–201). Judge Jones, dissenting, thought that the requested instruction on quantum of evidence should have been given to the jury, and that failure to give it was prejudicial error because the evidentiary situation here differed materially from that in the *Goins* case (R. 201–204).

SUMMARY OF ARGUMENT

I

Assuming that the defendant in a perjury case is ordinarily entitled to have the jury instructed that the falsity of his oath must be proved by two witnesses or one witness and corroborating circumstances, we think that here in accordance with this Court's decision in *Goins* v. *United States*, 306 U. S. 622, the petitioner's conviction should be sustained on the ground that failure to give such instruction could not have been prejudicial. The issue which the jury determined under the judge's charge was whether the petitioner was the real purchaser of certain tires or whether he was merely an accommodation party. It is inconceivable that the jury could have accepted the testimony of either of the principal witnesses, Sweeney and Roatche, without accepting that of the other; or that with such acceptance, it could have rejected the corroborative evidence supplied by the letter of March 24, 1942, in which the petitioner acknowledged purchasing the tires. On the record, there is no possibility that the jury credited a smaller aggregate of evidence than would have been called for by the requested charge.

II

We renew here the contention made by the Government in the *Goins* case that the rule requiring a special quantum of evidence to convict of perjury should be rejected. The origin and development of the perjury rule, in an environment irrelevant to the conditions of modern criminal administration, lead us to question its continuing claim to contemporary application. Judicial decisions show that the continuous and, we submit, ineffectual attempts to refashion the rule to meet current needs have resulted only in confusion and uncertainty with respect to the rule's scope.

On examining the only justifications offered in support of the rule's present vitality, we find none of them persuasive. The principle of "oath against oath" is pure anachronism, and it is enough to point to the crime of murder to establish that justifications in terms of the greater enormity of perjury are unpersuasive. The more plausible argument that the perjury rule serves a useful function in encouraging witnesses to testify by reducing the fear of unfounded perjury prosecutions also appears spurious on close examination. On balance, it is heavily outweighed by a more fundamental objective of the law: to encourage witnesses to testify to the truth.

Of this Court's authority to abrogate the perjury rule, we believe there is no serious doubt. The issue is clearly within the realm in which "this Court has, from the very beginning of its history, formulated rules of evidence to be applied in federal criminal prosecutions." *McNabb* v. *United States,* 318 U. S. 332, 341. See also *Funk* v. *United States,* 290 U. S. 371; *Wolfle* v. *United States,* 291 U. S. 7, 13. Nor does any prior decision of this Court in which any sanction has been given to the rule bar its rejection. This is a matter in which it is appropriate for the highest court of the land to point the lead by declaring a rule better adapted "to the successful development of the truth" than the inherited perjury rule. *Funk* v. *United States,* 290 U. S. 371, 381.

III

If the perjury rule is to be affirmed as law, we contend that it should be a rule for the court and not for the jury. It seems to us incontestable that in this posture the rule would fulfill the protective function claimed for it and at the same time eliminate from federal criminal administration the unnecessary confusion of juries and the potentiality of injustice that mandatory instructions on a special quantum of proof would inevitably entail.

ARGUMENT

I

THE JURY MUST HAVE CREDITED AT LEAST TWO WITNESSES TO HAVE REACHED ITS VERDICT OF GUILTY. UNDER THE GOINS DECISION IT WAS THEREFORE NOT PREJUDICIAL ERROR TO REFUSE THE REQUESTED CHARGE

Assuming that the defendant in a perjury case is ordinarily entitled to have the jury instructed that the falsity of his oath must be proved by two witnesses or one witness and corroborating circumstances, we think that here, in accordance with this Court's decision in *Goins* v. *United States*, 306 U. S. 622, the petitioner's conviction should be sustained on the ground that failure to give such instruction could not have been prejudicial.

In the *Goins* case the question at issue was the falsity of the defendant's testimony that he had not been in Chicago. The witnesses against him were one Millhorn, who testified that he had accompanied Goins and his wife to Chicago, and a hotel clerk, who testified that Goins had registered at a Chicago hotel. Both were corroborated by a hotel registration card bearing Goins' name. The Circuit Court of Appeals for the Fourth Circuit, in an opinion by Judge Parker, held that the failure to give an instruction as to the quantum of evidence was not reversible error, since it was "inconceivable that the jury should have accepted the testimony of either of the witnesses and at the same time rejected the corroborative evidence." 99 F. (2d) 147, 149. This Court dismissed certiorari after hearing argument, "As it appears * * * that the District Court's failure to give Instruction B[2] could not have prejudiced the petitioner." 306 U. S. 622.

In the instant case, the issue which the jury determined under the judge's charge, *supra*, p. 7, was whether the petitioner was the real purchaser of the 170 tires sold by United States Petroleum Corporation or whether he was acting merely as an accommodation party. To paraphrase Judge Parker's statement in the *Goins* case, it is equally inconceivable here that the jury should have accepted the testimony of Sweeney or Roatche and at the same time rejected the corroborative evidence supplied by the notarized letter of March 24, 1942, in which the petitioner acknowledged purchasing the tires.

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[2] This requested instruction, on the quantum of evidence required, is set forth in the Government's brief in the *Goins* case, No. 516, October Term, 1938, at p. 2.

Both in his testimony at the first criminal trial and at the perjury trial, the petitioner's explanation of the apparent purchase shown by his letter of March 24, 1942, was that he was acting not for himself but to assist Sweeney and Roatche, to whom he referred, respectively, as "the first purchaser" and "the ultimate buyer" of the tires (R. 132a). Sweeney and Roatche each separately denied any such relationship to the transaction as that ascribed to him by the petitioner. Sweeney testified categorically that he had not bought the tires and had no personal arrangement with the petitioner in respect of the tires; that he had acted solely for his company in the sale of the tires. Roatche testified that he had not bought or received the tires himself and that the petitioner had not loaned him any money to purchase the tires.

Hence, the situation was not one where, to reach the verdict it did, the jury could have believed only *one* principal witness, as the dissenting judge thought (R. 204). If the jury believed that either Sweeney or Roatche had been a real beneficiary of the tire purchase, that would have made the petitioner's description of himself as a mere go-between credible. Therefore, it is only by believing the denials of personal interest of *both* of these witnesses that the jury could logically have concluded that the petitioner was the real buyer.

We do not deny that where the record would oblige an appellate court to speculate over whether the jury credited more than one witness, failure to give the requested instruction, if error at all, would constitute reversible error. Cf. *Bruno* v. *United States*, 308 U. S. 287. This is not such a case. Upon the record here there is room for speculation only as to how much the jury believed in excess of the minimum prescribed by the rule. It may be, for example, that the jury concluded that the "Bob Hastings" letter was signed by or under the direction of the petitioner. If so, it afforded additional corroboration. Such acceptance of it increases rather than diminishes the logical necessity of accepting the testimony of Sweeney and Roatche and the direct implications of the March 24 letter. Similarly, the jury may have been aided in deciding by the testimony of Gabel and Oates. But, as a matter of psychological possibility, it is even less conceivable here than in the *Goins* case[3] that the jury credited a smaller aggregate of evidence than would be required by the most generous application of the rule. See also *Pawley* v. *United States*, 47 F. (2d) 1024 (C. C. A. 9).

II

THE REQUIREMENT OF A SPECIAL QUANTUM OF EVIDENCE FOR CONVICTION OF PERJURY SHOULD BE REJECTED BY THIS COURT

When the *Goins* case was before this Court, the Government contended that the rule requiring a special quantum of evidence to convict of perjury should be re-examined and rejected. We renew the contention here. The evidential standards applicable to perjury cases should not, in our view, differ from those which obtain in prosecutions for other crimes.

(A) THE ORIGIN AND SCOPE OF THE RULE

The origin, history, and development of the perjury rule are comprehensively discussed by Dean Wigmore in his *Treatise on Evidence*, 3d ed., Vol. 7, Secs. 2040–2043. Until the abolition of the Court of Star Chamber in 1640, perjury of witnesses had as a matter of practice been prosecuted in that Court rather than in the King's

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[3] As appears from the opinions in the Circuit Court of Appeals in the *Goins* case, (99 F. (2d) at 148, 149, 151, 152), one of the two witnesses there was a narcotic addict and a felon, and the authenticity of the hotel registration card was challenged.

Bench. The Star Chamber applied the canonical law, including the requirement of proof by at least two witnesses.[4] This circumstance may, as Wigmore suggests, explain the origin, following the transfer of Star Chamber jurisdiction, of a special requirement of proof in prosecutions for perjury at common law.[5] There was, however, a practical reason for distinguishing perjury from other crimes. At that time a defendant was generally disqualified to testify in his own behalf. But in perjury cases his statement under oath was, in effect, in evidence for him. In *Queen* v. *Muscot*, 10 Mod. 192 (1714), Parker, C. J., in charging the jury, attributed to this circumstance the following significance:

> There is this difference between a prosecution for perjury and a bare contest about property, that in the latter case the matter stands indifferent; and, therefore, a credible and probable witness shall turn the scale in favour of either party; but in the former, presumption is ever to be made in favour of innocence; and the oath of the party will have a regard paid to it until disproved. Therefore, to convict a man of perjury, a probable, a credible witness

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[4] Wigmore, *Evidence*, Sec. 2032. See Appendix to Government's brief on reargument in *Cramer* v. *United States*, No. 13, October Term, 1944, pp. 40–41.

[5] Wigmore, op. cit., Sec. 2040. For a more detailed discussion of the treatment of perjury in England prior to 1640, see New York Law Rev. Comm., *Report, Recommendations and Studies* (1935), pp. 235–238.

> is not enough; but it must be a strong and clear evidence, and more numerous than the evidence given for the defendant, for else there is only oath against oath.[6]

That the inadequacy of "oath against oath" became the ultimate rationale of the perjury rule in the common law courts is abundantly established both by the text writers and the early decisions. See *United States* v. *Wood*, 14 Pet. 430, 437–439. It is doubtful that two direct witnesses to the falsity of the oath were ever authoritatively required in the common law courts.[7] But the principle that something more is necessary than the testimony of a single witness has persisted until modern times. Generally the product of judicial decision,[8] as in the federal courts, the rule has been crystallized by statute in England, Canada, and nine of the States.[9]

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[6] In commenting on this case, Best, in his treatise on Evidence (3d Amer. ed.) Sec. 603, observes: "* * * there is nothing in Chief Justice Parker's charge inconsistent with the supposition that his observations were made in the way of prudential advice and direction to the jury, and not with the view of laying down an imperative rule of law; and this supposition is in some degree confirmed by the comparison with which he sets out, between the proof in perjury and that in civil cases." See also, Parker, J., in *Goins* v. *United States*, 99 F. (2d) 147, 150.

[7] In *R.* v. *Champney*, 2 Lew. Cr. C. 258 (1836), Colredge, J., stated that Lord Tenterden had maintained that two witnesses were necessary, although he himself merely held that one witness was not enough unless strongly corroborated. But as early as 1736, Lord Hardwick in *R.* v. *Nunez*, Lee Cases T. Hardwick, 265, stated: "One witness is not sufficient unless there were very strong circumstances." At about the time of *R.* v. *Nunez*, the chancery rule requiring two witnesses was being modified to provide for one witness and corroborating circumstances. *Walton* v. *Hobbs*, 2 Atk. 20 (1739). See Gest, *Responsive Answer in Equity*, 52 Am. L. Reg. 537, 560 (1904). It may be that two witnesses were necessary, however, in the sense that if corroboration were relied upon, the corroboration must be by an independent

Despite general recognition that the rule persists, there is wide disagreement as to its meaning and scope. With respect to the degree of corroboration required, some courts have held that corroboration must be by evidence of weight equal to the direct testimony of a second witness,[10] while others have ruled that the defendant's own demeanor as a witness may alone provide sufficient corroboration.[11] Where, by the nature of the issue, direct testimony is impossible, it has been held, in qualification of the rule, that circumstantial evidence is enough. *People* v. *Doody*, 172

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witness. *State* v. *Hayward*, 1 Nott. Mc. (S. C.) 546, 548 (1819).

[8] A list of state decisions either declaring or assuming the rule appears in the decision of this Court in *Hammer* v. *United States*, 271 U. S. 620, 626–627.

[9] A list of the statutes codifying the rule appears in the Appendix, *infra*, p. 28.

[10] *Hall* v. *State*, 136 Fla. 644, 674 (1939); *State* v. *Hardiman*, 277 Mo. 229, 233 (1918); *Gandy* v. *State*, 23 Neb. 436, 450 (1888).

[11] *Boren* v. *United States*, 144 Fed. 801, 806 (C. C. A. 9); *People* v. *Todd*, 9 Cal. App. (2d) 237, 241 (1935); *State* v. *Miller*, 24 W. Va. 802 (1884).

N. Y. 165.[12] See also *O'Leary* v. *United States*, 158 Fed. 796 (C. C. A. 1); *State* v. *Cerfoglio*, 46 Nev. 332 (1922); *State* v. *Woolley*, 109 Vt. 53 (1937). So too the defendant's admission may itself suffice. *United States* v. *Buckner*, 118 F. (2d) 468 (C. C. A. 2). See also *Fraser* v. *United States*, No. 677 Present Term, pending on petition for certiorari to the Sixth Circuit. Moreover, this Court, more than a century ago established the even broader qualification that direct testimony is unnecessary where the falsity of the oath can be proved by documentary evidence. *United States* v. *Wood*, 14 Pet. 430. And the Supreme Court of Oregon has recently held that the perjury rule, codified by statute in that state, does not apply to the crime of false swearing, taking the position that the false swearing statute was designed to escape the burdensome conditions imposed by the perjury rule. *State* v. *King*, 165 Ore. 26 (1940).[13] We find in the decisions as a whole a growing difficulty with defense of the rule in terms of relevant policy.

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[12] This qualification has been approved in two of the federal courts, *Behrle* v. *United States*, 100 F. (2d) 714, 715 (App. D. C.); *United States* v. *Otto*, 54 F. (2d) 277, 279 (C. C. A. 2) (recognized but held not applicable to a situation where there could be a living witness). See also *Mallard* v. *State*, 19 Ga. App. 99 (1916); *State* v. *Wilhelm*, 114 Kan. 349, 352 (1923); *R.* v. *Natanson*, 3 D. L. R. 308 (1927).

[13] A somewhat similar attempt to escape the limitations of the perjury rule is reflected in *Kahn* v. *United States*, 214 Fed. 54, 56 (C. C. A. 2), in which the court said that the perjury rule has become inapplicable to modern conditions and did not apply to the crime of false swearing under Section

In two states, rejection of the rule has been preferred to *ad hoc* qualification. The Supreme Court of Minnesota, in 1921, concluded that the rule is "out of harmony with our system of jurisprudence". *State* v. *Storey*, 148 Minn. 398. And in 1925, the Supreme Court of Delaware reached a like result. *Marvel* v. *State*, 33 Del. 110 (1925). In these states, proof beyond a reasonable doubt suffices for perjury as for other crimes.

(B) POLICY OF THE RULE

Criticism of the rule in its various versions has accumulated for more than a century. We agree with the courts of Minnesota and Delaware that the critics make an unanswerable case.

1. No argument is needed to show that there is no intrinsic objection to conviction of crime based upon "oath against oath." Whatever its weight before the defendant was a competent witness, it is clear today that the objection, if valid, must apply to any crime. We think the objection is invalid. Long ago Starkie observed, in describing

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29 (b) of the Bankruptcy Act. See also *Schonfeld* v. *United States*, 277 Fed. 934 (C. C. A. 2). But in *United States* v. *Isaacson*, 59 F. (2d) 966, 968, the same circuit applies the perjury rule to a charge of false swearing under the naturalization statute, and in *Hammer* v. *United States*, 271 U. S. 620, 625–626, this Court, in a case involving subornation of perjury, held that false swearing in bankruptcy is perjury and that the perjury must be proved by more than one witness.

the perjury rule as "arbitrary and peremptory" that "it very frequently happens, in particular cases, that the testimony of a single witness preponderates against the united testimony of many". Evidence, 2d Am. ed., [1828] v. 3, p. 1144. The point is sustained by daily experience in the courts.

2. Equally without substance is the suggestion, drawn from the old books (*e. g.*, Hawkins, *Pleas of the Crown*, Bk. 1, Ch. 69 (6th ed. 1777) p. 319) that perjury is a crime of so much greater enormity than others that more or stronger evidence should be required to convict. Cf. *State* v. *Courtright*, 66 Ohio 35, 41. It is enough to point to murder to establish that neither the premise nor the conclusion is sound.

3. A more plausible justification of the rule, given currency by Best (*Evidence*, Section 606), is that it encourages witnesses to testify by reducing the fear of unfounded perjury prosecutions. Other judicial requirements of corroboration, as in the case of confessions, are based—at least in substantial part—upon a doubt of the trustworthiness of the kind of evidence involved. We doubt that there are other situations where, as in the present case, a special requirement of corroboration must be justified solely in terms of policy wholly extrinsic to the validity of proof. Thus the theory advanced by Best and echoed in

many decisions introduces an anomaly in the general theory of proof.

Whether anomalous or not, the theory advanced is insubstantial on the merits. The policy of the law is not to encourage witnesses to testify but to encourage them to testify to the truth. The duty to testify is sanctioned as such by provision for compulsory process. But only the punishment for perjury provides a legal sanction for the duty to testify to the truth. It is difficult, therefore, to understand how the rule can be thought necessary to encourage testimony or how it can operate to encourage testimony of the truthfulness that the law seeks.

The issue has been posed in a different way by Dean Wigmore: "If there is a relatively greater likelihood of false accusation of perjury (on the part of defeated litigants seeking to revenge themselves), and if there is, relatively to the interests of litigants in general, less harm in the escape of a guilty perjurer than in that of other criminals, then the rule justifies its existence." Even in these terms, we think the answer is plain. To protect against false accusations of perjury, the law affords the arsenal of safeguards surrounding any prosecution for crime; in an age of public prosecution false accusations of perjury are inherently unlikely to cause harm. But general experience and such special studies as have been made[14] suggest the conclusion that while perjury is frequent, the punishment of perjury is the exception rather than the rule. It should not be forgotten, moreover, that the sanction of perjury prosecution is itself an instrument for the protection of innocence—insofar as it operates to deter false testimony against defendants in criminal trials.

For the foregoing reasons, we submit that there is insufficient basis for the conclusion stated in *Hammer* v. *United States*, 271 U. S. 620, 627, that the perjury rule "is sound and has been found satisfactory in practice." The conditions which gave rise to the rule no longer exist and no cogent justification has been adduced for its retention in modern times.

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[14] *The Genesis of Perjury*, 25 Jour. Jur. 491 (1893); Safford, *The Present State of the Law of Perjury*, 2 Am. L. Rec. 321 (1873); Purrington, *The Frequency of Perjury*, 8 Col. Law Rev. 67 (1908); King, *Perjury in Illinois*, 17 Ill. L. Rev. 596 (1923); McCarthy, *Perjury in Judicial Proceedings*, 35 Amer. L. Rev. 684 (1901); *Perjury in Judicial Proceedings*, 64 U. S. L. R. 1 (1930); Hirschman, "*You Do Solemnly Swear!" or that Perjury Problem*, 24 J. of Cr. L. and Crim. 901 (1934); *The Problem of Successful Perjury*, 78 Sol. J. 423 (1934); McClintock, *What Happens to Perjurers*, 24 Minn. L. Rev. 727 (1940); New York Law Revision Commission, *Reports, Recommendations and Studies* (1935) pp. 285–292; and see speech of G. Lamb in Hans. Parl. Deb., 2nd series, v. 18 (1828) p. 867, quoted in Wigmore op. cit., Sec. 2041, fn. 1.

(C) AUTHORITY OF THIS COURT TO ABROGATE THE RULE

If, as we contend, the perjury rule is without substantial justification, the rule should be rejected by this Court in the exercise of its acknowledged function of determining "proper standards for the enforcement of the Federal criminal law in the Federal Courts". The issue is clearly within the realm in which "this Court has, from the very beginning of its history, formulated rules of evidence to be applied in federal criminal prosecutions." *McNabb* v. *United States,* 318 U. S. 332, 341. See also *Funk* v. *United States,* 290 U. S. 371; *Wolfle* v. *United States,* 291 U. S. 7, 13.

No controlling decision of this Court bars rejection of the rule. In *United States* v. *Wood,* 14 Pet. 430, the rule was recognized in the opinion but the decision qualified its scope. *Hammer* v. *United States,* 271 U. S. 620, affirmed the validity of the rule in general but the decision, if limited to the facts, involves only an incredible witness. *Goins* v. *United States,* 306 U. S. 622, held that failure to incorporate the rule in the charge was not prejudicial error. In *Warszower* v. *United States,* 312 U. S. 342, 347–8, the rule was not genuinely involved and the passing reference to it in the opinion is neutral in its effect. These are the only decisions of this Court which give any sanction to the rule. They do not suffice, in our view, to put it beyond the duty of the Court to re-examine its foundations when an appropriate challenge is made.

It is true that the rule involved in the present case, though attenuated in various ways, has not, as in ***Funk*** v. ***United States, supra,*** been generally repudiated by statute or decision in the several states. But this is not, in our view, sufficient to sustain the rule if, as we contend, it cannot be justified on the merits. We read the decision in the ***Funk*** case to affirm as the basic measure of common law evidential rules "their adaptation to the successful development of the truth". 290 U. S. at 381. We read the opinion in the ***Wolfle*** case to mean that a common law rule must fall, however widely accepted, if it fails to meet the test of "reason and experience" (291 U. S. at 12) as applied by the federal courts. The standard must certainly contemplate that in matters peculiarly of judicial competence the highest court of the land may point the lead.

Unlike the rule in treason (Const. Art. III, §3), the perjury rule rests on neither constitutional nor statutory basis. It is the product of judicial decision and by judicial decision may properly be undone.

III

IF THE PERJURY RULE IS TO BE AFFIRMED AS LAW IT SHOULD BE VIEWED AS A RULE FOR THE COURT AND NOT FOR THE JURY

If the perjury rule is to be affirmed as law, we think its policy must necessarily be the protection of witnesses against unjust accusation. We contend that this purpose is adequately served by the conception of the rule advanced by Judge Maris in the court below—as a rule for the court and not for the jury. Measured in these terms, the rule would preclude submission of the cause if the evidence of perjury were limited to the testimony of a single witness. Whatever its merit, this is a standard susceptible of rational application by the courts. But if the rule is viewed as a standard for the guidance of the jury, we see no escape from Judge Maris' conclusion that

> * * * the interjection of the rule into their deliberations would impede rather than aid them in reaching a right decision upon the sole issue with which they are concerned, the guilt or innocence of the defendant. For if such an instruction is to mean anything it must mean that the members of the jury must make an independent decision as to the credibility of each government witness before they determine the guilt of the accused and, if they find themselves unable to credit the corroborating witness whom the Government has offered, they must acquit the defendant even though they may be so well satisfied of the credibility of the principal government witness as to be convinced beyond doubt of the defendant's guilt. Anyone who has had practical experience in the conduct of jury trials knows that the mem-

> bers of a jury who are thus convinced of the defendant's guilt cannot be expected to pay much attention to a rule such as this which, even if understood, is likely to be viewed by them as legalistic and technical. (R. 195–196.)

It seems to us incontestable that the protective function claimed for the rule does not warrant the distortion of the deliberative powers of the jury that mandatory instructions on a special quantum of proof would inevitably entail.

We submit moreover that the position taken by Judge Maris is the logical effect of the decision of this Court in the *Goins* case, as Judge Bard suggested in the court below. In the *Goins* case it was not logically impossible, however improbable in fact, for the jury to have concluded that the corroborating evidence was not itself entitled to weight at the same time that it credited the testimony of the principal witness. (See the dissenting opinion of Judge Soper, 99 F. (2d) at 142.) We think, therefore, that in concluding that the failure of the trial court to give the requested instruction "could not have prejudiced the petitioner" this Court necessarily held it unnecessary for the corroborating evidence to have such weight with the jury that it would be credited if it stood by itself But if the rule requires no more than that the corroboration be credited when viewed along with the testimony of the principal witness, it has no substantial validity as a rule for the jury. For, where the evidence, including the corroboration, has sufficient weight for the case to go to the jury at all, it is almost inevitable that a jury which credits the principal witness will also accept the corroborative evidence that points in the same way. It seems plain, therefore, that the rule can serve a substantial function, if at all, only as a rule for the court.

CONCLUSION

For the foregoing reasons, we contend that the judgment of conviction should be affirmed.

Respectfully submitted.

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January 1945.

APPENDIX

STATUTORY CODIFICATIONS OF THE PERJURY RULE

Arizona Code Anno. (1939), Sec. 44, 1812, 1813
(Penal Code (1901), Secs. 930, 931)[15]
California Penal Code (Deering, 1941), Sec. 1103 (a)
(Code of Civil Procedure (1872), Sec. 1968)
Colorado Stat. Anno. (1935), Ch. 48, Sec. 448
(General Laws (1877), p. 322)
(limited to indictments)
Georgia Code Anno. (1936), Title 38, Sec. 121
(Code of 1895), Sec. 991
Idaho Code Anno. (1932), Ch. 5, Secs. 16–501
(Code of Civil Procedure (1881), Sec. 933)
Montana Revised Codes (Choate, 1935), Sec. 10608
(Code of Civil Procedure (1877), Sec. 598)
Ohio Code Anno. (Baldwin, 1940), Secs. 13444–22
(Laws of Ohio (1929), p. 190)
Oregon Compiled Laws Anno. (1940), Sec. 2–902
(Code of Civil Procedure (1862), Ch. VIII, Title VIII, Sec. 768)
Texas Code of Criminal Procedure (Vernon, 1925), Title 8, Article 723
(Code of Criminal Procedure (1857), Art. 657)
England—St. 1911, 1 and 2, Geo. V. C. 6, Sec. 13
Canada—R. S. 1906, c. 146

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[15] The citations in parentheses show the date of original enactment.

U. S. GOVERNMENT PRINTING OFFICE 1945

SUPREME COURT OF THE UNITED STATES.

No. 340.—October Term, 1944.

Lee F. Weiler, Petitioner, *vs.* United States of America.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[January 29, 1945.]

Mr. Justice Black delivered the opinion of the Court.

This Court stated in *Hammer* v. *United States*, 271 U. S. 620, 626, that "The general rule in prosecutions for perjury is that the uncorroborated oath of one witness is not enough to establish the falsity of the testimony of the accused set forth in the indictment." The question here is whether it is reversible error to refuse to charge the jury to this effect.

The petitioner was convicted of perjury in a federal district court.[1] In a prior criminal proceeding for violation of Office of Price Administration regulations he had testified that he had neither bought nor had in his possession in March, 1942, certain automobile tires. He further testified that although he had signed a notarized letter in which he stated that he had purchased the tires, he was not in reality the purchaser, but had merely lent the money for their purchase, and had signed the letter as an accommodation. The jury acquitted him and he was then indicted for perjury. The indictment charged that his testimony with reference to the tire transaction was false. In the perjury trial the petitioner reiterated his former testimony as to the tire transaction. Several government witnesses gave testimony from which the jury could have found that petitioner was in fact the purchaser.

When the evidence was completed, petitioner requested the trial judge to give the following instruction to the jury:

> "The Government must establish the falsity of the statement alleged to have been made by the defendant under oath, by the testimony of two independent witnesses or one witness and corroborating circumstances. Unless that has been done, you must find the defendant not guilty."

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[1] 18 U. S. C. 231, defines the federal offense of perjury.

This instruction was refused, and the trial judge, in his oral charge completely omitted any reference to the "two witness rule" in perjury cases. The petitioner was convicted, and the Circuit Court of Appeals affirmed on the ground that it was for the court to determine whether the quantitative rule of evidence in perjury had been satisfied, that it had been satisfied in this case, and that consequently, the District Court had properly refused the requested charge. 143 F. 2d 204. Other Circuits have held that similar charges should be given. *Pawley* v. *United States*, 47 F. 2d 1024. 1026, (C. C. A. 9); *Allen* v. *United States*, 194 F. 664. 668. (C. C. A. 4).

In granting certiorari, — U. S. —, we limited review solely to the question of whether the trial court erred in denying this charge.

First. The government asks that we reexamine and abandon the rule which bars a conviction of perjury on the uncorroborated testimony of a single witness. The argument is that while this quantitative rule as particularly applied to perjury cases may have been suited to the needs of the 18th Century, it has long since outlived its usefulness, that it is an incongruity in our modern system of justice, and that it raises an unjustifiable barrier to convictions for perjury.

Our system of justice rests on the general assumption that the truth is not to be determined merely by the number of witnesses on each side of a controversy. In gauging the truth of conflicting evidence, a jury has no simple formulation of weights and measures upon which to rely. The touchstone is always credibility; the ultimate measure of testimonial worth is quality and not quantity. Triers of fact in our fact-finding tribunals are, with rare exceptions, free in the exercise of their honest judgment, to prefer the testimony of a single witness to that of many.

The special rule which bars conviction for perjury solely upon the evidence of a single witness is deeply rooted in past centuries. That it renders successful perjury prosecution more difficult than it otherwise would be is obvious, and most criticism of the rule has stemmed from this result. It is argued that since effective administration of justice is largely dependent upon truthful testimony, society is ill-served by an "anachronistic" rule which tends to burden and discourage prosecutions for perjury. Proponents of the rule on the other hand, contend that society is well-served

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[2] Wigmore on Evidence (Third Edition) §§ 2030-2044.

by such consequence. Lawsuits frequently engender in defeated litigants sharp resentments and hostilities against adverse witnesses, and it is argued, not without persuasiveness, that rules of law must be so fashioned as to protect honest witnesses from hasty and spiteful retaliation in the form of unfounded perjury prosecutions.

The crucial role of witnesses compelled to testify in trials at law has impelled the law to grant them special considerations. In order that witnesses may be free to testify willingly, the law has traditionally afforded them the protection of certain privileges, such as, for example, immunity from suits for libel springing from their testimony.[3] Since equally honest witnesses may well have differing recollections of the same event, we cannot reject as wholly unreasonable the notion that a conviction for perjury ought not to rest entirely upon "an oath against an oath." The rule may originally have stemmed from quite different reasoning, but implicit in its evolution and continued vitality has been the fear that innocent witnesses might be unduly harassed or convicted in perjury prosecutions if a less stringent rule were adopted.

Whether it logically fits into our testimonial pattern or not, the government has not advanced sufficiently cogent reasons to cause us to reject the rule. As we said in *Hammer v. United States*, *supra*, 626-627, "The application of that rule in federal and state courts is well nigh universal. The rule has long prevailed, and no enactment in derogation of it has come to our attention. The absence of such legislation indicates that it is sound and has been found satisfactory in practice."[4]

Second. The court below held, and the government argues here, that it is solely the function of the judge finally to determine whether a single witness and sufficient corroborative evidence have

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[3] See also 8 Wigmore, *supra*, Sec. 2195g.

[4] After a careful study made by a joint Parliamentary Committee, looking to a codification of English criminal laws, it unanimously recommended and Parliament passed the following law:

"A person shall not be liable to be convicted of any offence against this Act, or of any offence declared by any other Act to be perjury or subornation of perjury, or to be punishable as perjury or subornation of perjury solely upon the evidence of one witness as to the falsity of any statement alleged to be false." [redacted] Parliamentary Debates, Lords, Vol. VII, 1911, pp. 143-146; Reports from the Joint Select Committee of the House of Lords and the House of Commons on the Licensing (Consolidation) Bill and the Perjury Bill [H. L.], 1910, No. 321, p. 62. Cf. State v. Story, 148 Minn. 398; Marvel v. State, 33 Del. 110.

Perjury Act, 1911, 1 & 2 Geo. V, c. 6, sec. 13,
Public General Acts, 1st & 2nd Geo. V, 1911;

been presented to sustain a conviction. Two elements must enter into a determination that corroborative evidence is sufficient: (1) that the evidence, if true, substantiates the testimony of a single witness who has sworn to the falsity of the alleged perjurious statement; (2) that the corroborative evidence is trustworthy. To resolve this latter question is to determine the credibility of the corroborative testimony, a function which belongs exclusively to the jury.[5] Thus, to permit the judge finally to pass upon this question would enable a jury to convict on the evidence of a single witness, even though it believed, contrary to the belief of the trial judge, that the corroborative testimony was wholly untrustworthy. Such a result would defeat the very purpose of the rule, which is to bar a jury from convicting for perjury on the uncorroborated oath of a single witness. It is the duty of the trial judge, when properly requested, to instruct the jury on this aspect of its function, in order that it may reach a verdict in the exercise of an informed judgment. Cf. *Bruno* v. *United States*, 308 U. S. 287. The refusal of the trial judge to instruct the jury as requested was error.

Third. It is argued that this error did not prejudice the defendant. We cannot say that it did not. The jury convicted without being instructed that more than the testimony of a single witness was required to justify their verdict. This was no mere "technical" error relating to the "formalities and minutiae" of the trial. *Bruno* v. *United States*, *supra*, 293, 294. We are not authorized to look at the printed record, resolve conflicting evidence, and reach the conclusion that the error was harmless because we think the defendant was guilty. That would be to substitute our judgment for that of the jury and, under our system of justice, juries alone have been entrusted with that responsibility. Nor are we compelled to conclude that this error was harmless because of our action in *Goins* v. *United States*, 306 U. S. 622, by which we left undisturbed a holding of the Circuit Court of Appeals that Goins, convicted for perjury, had not been prejudiced by the refusal of a charge on the two witness rule. *Goins* v. *United States*, 99 F. 2d 147. That case was decided on the basis of its own peculiar facts and cannot be extended to the facts of this one.

Reversed.

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[5] See State *v.* Hill, 223 N. C. 711; Brown *v.* State, 101 Tex. Crim. 639, 644; Clower *v.* State, 151 Ark. 359; Madden *v.* State, 26 Okla. Crim. 251.